

**IN THE UNITED STATES
DISTRICT COURT FOR THE
MIDDLE DISTRICT OF ALABAMA**

**IN RE:
PHILLIP GOODWYN,
DEBTOR,**

**SIMPLE PLEASURES, INC.,
PLAINTIFF,**

V.

**V. RESTAURANTS, INC., AND
VINCE SAELE,
DEFENDANTS.**

**CIVIL CASE NUMBER
2:06-CV-893-WKW**

**MOTION FOR DISTRICT COURT'S
RECONSIDERATION OF SUMMARY
JUDGMENT**

COMES NOW V Restaurants, Inc. and Vince Saele, Defendants in the above styled action, by and through their attorney of record, and moves this Honorable Court to reconsider the summary judgment motion pursuant to *Fed.R.Civ.P. 56*, said motion being filed prior to withdrawal of bankruptcy reference. This motion is based on the following grounds:

1. The Defendants filed a motion for summary judgment on March 14, 2006 while the instant case was before the United States Bankruptcy Court for the Middle District of Alabama.

2. The Bankruptcy Court conducted a very brief hearing on the Defendant's motion at which time the Plaintiffs withdrew their jury demand and agreed to the

dismissal of then co-defendant Spectrum/Vaughan Plaza, L.L.C. The Bankruptcy Court then denied in its entirety the Defendant's summary judgment motion that addressed all nine counts of the Plaintiff's complaint. In the Defendant's response to said motion, no "depositions, answers to interrogatories, *nor* admissions on file, together with the affidavits" as required by *Rule 56(c), Fed.R.Civ.Proc.* were advanced or cited to support genuine issues as to factual matters nor was reasons stated for the failure to provide such affidavits as required by *Rule 56(f), Fed.R.Civ.Proc.*.

3. Following the aforesaid hearing this Honorable Court withdrew the bankruptcy reference and set the instant case for jury trial before this Honorable Court.

4. The Defendant's summary judgment motion is due to be reconsidered in light of the anticipated trial before a jury. Judicial economy dictates that counts in a complaint that are not grounded in facts, non-existent claims of wrongdoing or legally impossible be stricken from the complaint.

5. The District Court is free to reconsider a previous ruling on summary judgment. This reconsideration can occur even in the absence of the presentation of new material. *Enlow v. Tishomingo County, Miss., C.A.5 (Miss.) 1992, 962 F.2d 501, rehearing denied 971 F.2d 750.* A prior ruling denying summary judgment motion does not bar reconsideration as case was in a posture for trial. *Weit v. Continental Illinois Nat. Bank and Trust Co. of Chicago, N.D.Ill.1979, 478 F.Supp. 285, affirmed 641 F.2d 457, certiorari denied 102 S.Ct. 1610, 455 U.S. 988, 71 L.Ed.2d 847, rehearing denied 102 S.Ct. 2001, 456 U.S. 938, 72 L.Ed.2d 461.*

6. The Defendants attach the original summary judgment motion along with attachments and depositions and the reply to response to motion for summary judgment.

Said records were also made a part of the record in this case as follows: Docket Entry Number 1, #16 Motion for Summary Judgment and #18 Reply to Response to Motion for Summary Judgment.

RESPECTFULLY SUBMITTED this the 4th day of December, 2006.

/s/ Daniel G. Hamm

DANIEL G. HAMM (HAM043)
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CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of this Motion for District Court's Reconsideration of Summary Judgment by electronic transmission or by placing a copy in the United States Mail with sufficient postage for first class delivery to the attorneys named below or parties if not represented by counsel.

DONE this the 4th day of December, 2006.

/s/ Daniel G. Hamm

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Von Memory
James Day
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Montgomery, Alabama 36104

**IN THE UNITED STATES
BANKRUPTCY COURT FOR THE
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION**

**IN RE:
PHILLIP GOODWYN,
DEBTOR,

SIMPLE PLEASURES, INC.,
PLAINTIFF,

V.

V. RESTAURANTS, INC.,
DEFENDANT.**

**CHAPTER 7
CASE NO. 05-32325-WRS

ADVERSARY PROCEEDING
NO. 05-03062**

**MOTION FOR SUMMARY
JUDGMENT**

COMES NOW V Restaurants, Inc. and Vince Saele, Defendants in the above styled action, by and through their attorney of record, and moves this Honorable Court pursuant to *Fed.R.Civ.P. 56* and *Fed.Bank.R. 7056* for entry of summary judgment in favor of the Defendants on the following issues:

Breach of Contract: The Plaintiff, Simple Pleasures, Inc., and Phillip Goodwyn were in breach of the contract by failing to comply with one of the material terms of contract between the Plaintiff and Defendants.

Conversion: There is no evidence of 1) a wrongful taking, 2) an illegal assumption of ownership, 3) an illegal use or misuse of another's property, or 4) a wrongful detention or interference with another's property.

Unjust Enrichment: The underlying contract made a part of the Plaintiff's complaint reflects the agreement between the parties and precludes recovery for unjust enrichment.

Damages for Use: The Defendants finds no actionable claim under Alabama law which fits the allegations contained in this count. In addition there is no proof that Gator's Restaurant generated any profits during the period between the time V Restaurants took possession of the restaurant and the time that Simple Pleasures' interest in the restaurant was terminated.

Fraud: The Plaintiff has produced 1) no evidence of a false representation of a material fact nor is there 2) a specified time, place or date as required by *Rule 9, Federal Rules of Civil Procedure* upon which any misrepresentation was made by the Defendants.

Negligence: The Plaintiff has produced 1) no evidence of any duty the Defendants owed the Plaintiff nor 2) that the Defendants were negligent in any manner.

Wantonness: The Plaintiff has produced 1) no evidence of a reckless indifference for the consequences, nor 2) some wrongful act or omission of some known duty which produced injury to the Plaintiff.

Willfulness: The Plaintiff has produced no evidence of 1) a willful or intentional injury nor 2) a knowledge of the danger accompanied with a design or purpose to inflict injury.

Conspiracy: The Plaintiff has produced no evidence 1) of any agreement between the Defendants that caused any harm to the Plaintiff and 2) conspiracy itself furnishes no cause of action in Alabama.

ADMISSIONS AND UNDISPUTED FACTS

1. Simple Pleasures was a restaurant and food service corporation in Montgomery, Alabama. Goodwyn is the president of Simple Pleasures. (Plaintiff's Complaint)

2. Simple Pleasures owns and previously operated a restaurant on the east side of Montgomery, Alabama commonly known as "Gators". Gators is located at 5040 Vaughn Road, Montgomery, AL, 36116-1149. Gators has been previously known as Gators Plaza Café, however, recently it was renamed Gators Fish House. (Plaintiff's Complaint)

3. Simple Pleasures had a host of financial problems including unpaid Federal tax obligations which resulted in Federal tax liens, unpaid obligations to Regions Bank and an arrearage owed to the restaurant's landlord. (Goodwyn deposition pg. 25 – 28)

4. In the past two years, Goodwyn and Simple Pleasures have actively pursued and investigated several offers to sell the assets, goodwill, and customer base of Gators. (Plaintiff's Complaint)

5. In or about July 2004, Goodwyn received an offer from V Restaurants and Saele to purchase Gators, and ultimately the parties agreed to a \$90,000.00 purchase price. (Plaintiff's Complaint)

6. For the purchase price, V Restaurants and Saele agreed to purchase Gators, as a going concern, to include all equipment, inventory and supplies, furniture, fixtures, and amenities. (Plaintiff's Complaint)

7. The above-referenced terms and conditions were integrated into a contract for sale and signed by the parties, September 24, 2004. (Plaintiff's Complaint)

8. Incident to the negotiations on the contract for sale, V Restaurants and Saele negotiated a \$30,000.00 payoff of the \$104,253.57 lease arrearage with Spectrum, a

\$30,000.00 payoff of the \$80,000.00 debt to Regions Bank, and an anticipated \$30,000.00 settlement of the *\$106,425.71* debt to the Internal Revenue Service. (Plaintiff's Complaint)

9. The Internal Revenue Service lien encumbering the restaurant property was in place and enforceable. These liens were never released nor did Mr. Goodwyn have the liens released as of the October 22, 2004 performance date as required by the letter of understanding. (Goodwyn deposition page 50 – 53)

10. The Regions Bank lien was not released as of the October 22, 2004, date nor did Mr. Goodwyn have an agreement with Regions to release said liens upon payment of \$30,000 to Regions as of October 22, 2004 as required by the letter of understanding. (Goodwyn deposition page 50 – 53)

11. Incident to the contract for purchase of Gators, Goodwyn verbally agreed to allow V Restaurants and Saele to take possession of the restaurant, pending approval of the application to the Internal Revenue Service. (Plaintiff's Complaint)

12. Following the signing of the letter of understanding on September 24, 2004, and the agreed date upon which the transfer was to take place, October 22, 2004, Robert J. Russell, Jr. made a number of phone calls to Mr. Memory's office to determine the progress of efforts on behalf of Mr. Goodwyn to clear the liens and encumbrances in question. Through-out all of theses calls Mr. Russell was never provided any assurance that the subject liens and encumbrances (Federal Tax lien and Regions lien) were being addressed by Mr. Goodwyn, nor did he have the financial ability to do so. (Affidavit of Robert J. Russell, Jr.)

13. V Restaurants and Saele signed a contract for sale, September 24, 2004. Incident to the instant contract, V Restaurants and Saele agreed, among other things, to purchase the going concern of Gators for \$90,000.00. (Plaintiff's Complaint)

14. During the course of negotiations for the letter of understanding dated September 24, 2004, there were no misrepresentations made to the Plaintiff by the Defendants. (Goodwyn deposition page 80 - 82)

15. V Restaurants and Saele assumed possession before the sale was closed. (Plaintiff's Complaint)

16. Incident to the instant contract V Restaurants and Saele agreed to purchase the going concern of Gators for \$90,000.00. (Plaintiff's Complaint)

17. Phillip Goodwyn is not aware of any agreement between or among the Defendants that may have caused him any harm. (Goodwyn deposition page 85 - 87)

18. Other than Simple Pleasures being unable to sell the Gator's restaurant to the Defendant, Mr. Goodwyn has no evidence that there was an agreement between anyone to support the conspiracy count. (Goodwyn deposition page 88 - 89)

RESPECTFULLY SUBMITTED this the 14th day of March, 2006.

/s/ Daniel G. Hamm

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CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of this **Motion for Summary Judgment** by electronic transmission or by placing a copy in the United States Mail with sufficient postage for first class delivery to the attorneys named below or parties if not represented by counsel.

DONE this the 14th day of March, 2006.

/s/ Daniel G. Hamm

DANIEL G. HAMM (HAM043)
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SIMPLE PLEASURES, INC.

V.

V RESTAURANTS, INC., et al.

PHILLIP GOODWYN

February 17, 2006

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PHILLIP GOODWYN - 2/17/2006

Page 1

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

IN RE:

PHILLIP GOODWYN, CASE NO.
Debtor. 05-32325-WRS

SIMPLE PLEASURES, CHAPTER 7
INC.,

Plaintiff,

vs. ADVERSARY

V RESTAURANTS, INC., PROCEEDING NO.

ET AL, 05-03062

Defendants.

* * * * * *

DEPOSITION OF PHILLIP GOODWYN,
VOLUME I, taken pursuant to notice and
stipulation on behalf of the
Defendant, in the Law Office of Von G.
Memory, P.A., 469 South McDonough
Street, Montgomery, Alabama 36104,
before Aimee French, Court Reporter
and Notary Public in and for the State

PHILLIP GOODWYN - 2/17/2006

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1 APPEARANCES	1 STIPULATIONS
2	2 It is hereby stipulated and
3 FOR THE PLAINTIFF:	3 agreed by and between counsel
4 VON G. MEMORY, ESQ.	4 representing the parties that the
5 MEMORY, DAY & AZAR	5 deposition of PHILLIP GOODWYN is taken
6 469 SOUTH MCDONOUGH STREET	6 pursuant to notice and stipulation on
7 POST OFFICE BOX 4054	7 behalf of the Defendant; that all
8 MONTGOMERY, AL 36104	8 formalities with respect to procedural
9	9 requirements are waived; that said
10	10 deposition may be taken before Aimee
11 FOR THE DEFENDANT:	11 French, Court Reporter and Notary
12 DANIEL G. HAMM, ESQ.	12 Public in and for the State of Alabama
13 560 SOUTH MCDONOUGH STREET	13 at Large, without the formality of a
14 SUITE 8	14 commission; that objections to
15 MONTGOMERY, AL 36104	15 questions, other than objections as to
16	16 the form of the questions, need not be
17 D. COLEMAN YARBROUGH, ESQ.	17 made at this time, but may be reserved
18 2860 ZELDA ROAD	18 for a ruling at such time as the
19 MONTGOMERY, AL 36106	19 deposition may be offered in evidence
20	20 or used for any other purpose as
21 ALSO PRESENT: Mr. Vince Saele	21 provided for by the Civil Rules of
22	22 Procedure for the State of Alabama.
23	23 It is further stipulated and

2 (Pages 2 to 5)

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PHILLIP GOODWYN - 2/17/2006

<p style="text-align: right;">Page 6</p> <p>1 agreed by and between counsel 2 representing the parties in this case 3 that the filing of the deposition of 4 PHILLIP GOODWYN is hereby waived and 5 that said deposition may be introduced 6 at the trial of this case or used in 7 any other manner by either party 8 hereto provided for by the Statute, 9 regardless of the waiving of the 10 filing of same. 11 It is further stipulated and 12 agreed by and between the parties 13 hereto and the witness that the 14 signature of the witness to this 15 deposition is hereby waived. 16 17 18 19 20 21 22 23</p>	<p style="text-align: right;">Page 8</p> <p>1 Avenue, Montgomery. 2 Q. And your last name is G -- would you 3 spell your name? 4 A. G-O-O-D-W-Y-N. 5 Q. And, Mr. Goodwyn, how are you employed 6 today? 7 A. Entec Stations. I'm supervisor of 8 food service. 9 Q. And how long have you been so 10 employed? 11 A. A month and a half, November of 2004. 12 Q. And you work at a particular station 13 or not? 14 A. No. I'm in the corporate office. 15 Q. And where is that located? 16 A. On Zelda Road. 17 Q. Here in Montgomery? 18 A. Correct. 19 Q. And once again, what are you doing for 20 Entec? 21 A. I developed a -- I'm in charge of 22 their food service development and 23 their fountain drinks and their</p>
<p style="text-align: right;">Page 7</p> <p>1 PHILLIP GOODWYN, 2 after having been first duly sworn 3 under oath, was examined and testified 4 as follows: 5 EXAMINATION BY MR. HAMM: 6 Q. Mr. Goodwyn, my name is Dan Hamm. I'm 7 going to be asking you some questions. 8 You've taken a deposition in this case 9 before; is that correct? 10 A. Yes. 11 MR. HAMM: Mr. Memory -- and I 12 guess Mr. Goodwyn will be rendering 13 testimony on behalf of Simple 14 Pleasures, Incorporated also? 15 MR. MEMORY: That's correct. 16 MR. HAMM: Very well. 17 Q. (BY MR. HAMM) Mr. Goodwyn, at any 18 time if you do not understand my 19 questions, please ask me to rephrase 20 the question, and I'll be glad to. 21 First of all, would you give us your 22 name and your address? 23 A. Phillip Lightfoot Goodwyn, 1533 Gilmer</p>	<p style="text-align: right;">Page 9</p> <p>1 coffees and marketing. 2 Q. How were you employed prior to your 3 employment with Entec? 4 A. As soon as I finished helping Vince 5 finish some catering parties, when I 6 finished my commitment -- 7 Q. That would be Mr. Saele? 8 A. Mr. Saele. Once I had finished 9 helping him through October, I went to 10 work immediately with them. 11 Q. October of 2005? 12 A. 4. 13 Q. 2000 -- okay. I thought you -- did 14 you not say a few moments ago that you 15 had been with Entec a month and a 16 half? 17 A. No, no. 18 Q. I'm sorry. 19 A. A year and -- a year since -- I've 20 been there since November of 2004. 21 Q. Okay. 22 A. I think that's what I said. 23 Q. And prior to your employment with</p>

3 (Pages 6 to 9)

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PHILLIP GOODWYN - 2/17/2006

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<p>1 Entec, you were employed how?</p> <p>2 A. I was the owner of Gator's.</p> <p>3 Q. The restaurant that is the subject of</p> <p>4 this litigation --</p> <p>5 A. Correct.</p> <p>6 Q. -- is that correct?</p> <p>7 A. Simple Pleasures, Inc.</p> <p>8 Q. You were the owner of Simple</p> <p>9 Pleasures, Incorporated?</p> <p>10 A. Correct. Or president.</p> <p>11 Q. Well, did you own all the stock?</p> <p>12 A. Yes.</p> <p>13 Q. No other stockholders?</p> <p>14 A. No other stockholders.</p> <p>15 Q. And how long had Simple Pleasures been</p> <p>16 in business?</p> <p>17 A. '92. It opened as Hillwood Cafe in</p> <p>18 Vaughn Plaza -- I mean, not in Vaughn,</p> <p>19 in Hillwood Festival Shopping Center.</p> <p>20 Q. And how did it come to be Gator's?</p> <p>21 A. Ed needed -- Ed Fatzinger needed a</p> <p>22 tenant over at -- in Vaughn Plaza, and</p> <p>23 he had lost the tenant there, and so I</p>	<p>1 both and management, my lack of</p> <p>2 ability for management style,</p> <p>3 probably, forced me into selling</p> <p>4 Hillwood to the manager of Hillwood,</p> <p>5 so I could operate only one.</p> <p>6 Q. You were operating at the Hillwood</p> <p>7 location or Simple Pleasures was</p> <p>8 operating the Hillwood location for</p> <p>9 three years, did you testify to</p> <p>10 earlier?</p> <p>11 A. I believe that's correct.</p> <p>12 Q. And that would have been, what, 1995</p> <p>13 or --</p> <p>14 A. '95.</p> <p>15 Q. Okay. And when did Gator's open?</p> <p>16 A. Well, '92, it was the end of '92. So</p> <p>17 really '93 was when Hillwood -- so it</p> <p>18 would have been, you know,</p> <p>19 three-and-a-half years, approximately</p> <p>20 more like three-and-a-half years that</p> <p>21 I operated Hillwood, owned and</p> <p>22 operated. I had Gator's for almost</p> <p>23 nine years.</p>
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<p>1 developed a business. I wanted to get</p> <p>2 away from Hillwood, which I was</p> <p>3 operating at that time, into a bigger</p> <p>4 market, which that area seemed to be.</p> <p>5 Things were going west -- east, and so</p> <p>6 we just came up with a name.</p> <p>7 Q. Was the nature of the business</p> <p>8 operated as Simple Pleasures,</p> <p>9 Incorporated operated at Hillwood?</p> <p>10 A. Similar, very similar to what Gator's</p> <p>11 was, which is a meat and three,</p> <p>12 lunch/vegetable thing and then a</p> <p>13 nicer, upscale dinner with seafood, so</p> <p>14 very similar style of restaurant.</p> <p>15 Q. And how long did Simple Pleasures</p> <p>16 operate the location that you term as</p> <p>17 Hillwood?</p> <p>18 A. Hillwood Cafe, I operated it from --</p> <p>19 for three years I owned it. It was</p> <p>20 about three years. The last six</p> <p>21 months, when I opened Gator's, I owned</p> <p>22 both of them at the same time. And</p> <p>23 Gator's -- the financial stress of</p>	<p>1 Q. And there was a period of time that</p> <p>2 they ran -- both businesses were</p> <p>3 operated?</p> <p>4 A. Absolutely, yes, simultaneously,</p> <p>5 correct.</p> <p>6 Q. Okay. Do you know how long that was</p> <p>7 for?</p> <p>8 A. Approximately six months.</p> <p>9 Q. Why did you wish to leave the Hillwood</p> <p>10 location?</p> <p>11 A. Hillwood has no evening traffic at all</p> <p>12 down Zelda at that time. It was very,</p> <p>13 very limited evening traffic, and it</p> <p>14 is a small restaurant that didn't</p> <p>15 allow us to do the volume we felt</p> <p>16 necessary to perform lunch properly.</p> <p>17 Q. With respect to Simple Pleasures,</p> <p>18 Incorporated, the profitability</p> <p>19 stemming from the Hillwood location,</p> <p>20 can you give me an idea as to what</p> <p>21 that looked like?</p> <p>22 A. Absolutely.</p> <p>23 Q. Okay.</p>

4 (Pages 10 to 13)

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PHILLIP GOODWYN - 2/17/2006

<p style="text-align: right;">Page 14</p> <p>1 A. When I took over -- when we took over, 2 I got into something that I didn't 3 know I was getting into. I was very 4 young in the business -- 5 Q. When you took over -- 6 A. -- meaning when I took over Hillwood. 7 When I bought Hillwood, Ed Fatzinger 8 came and got me to buy Hillwood as it 9 was from Gail Snyder and her group 10 that went eventually down the street. 11 I thought I was buying a restaurant, 12 in turn I was really buying a 13 nightclub with a loyal following to 14 Gail Snyder. When -- she did 15 everything in her power to destroy -- 16 she told me to destroy the business 17 that I had purchased from her, even as 18 going as far as -- I mean, just -- it 19 was unbelievable. So when she 20 actually opened up -- 21 Q. My -- 22 A. I'm going to give it to you in one 23 second. I'll be finished.</p>	<p style="text-align: right;">Page 16</p> <p>1 year before we made profits. 2 Q. With respect to the 1995 year, do you 3 remember a figure that Simple 4 Pleasures, Incorporated would have 5 enjoyed as far as net income as 6 reflected on the federal tax return? 7 A. The '94 showed like a \$60,000 profit. 8 '95 did not show a profit because 9 we -- because the investment -- or it 10 showed a flat profit, a very close 11 profit, because it invested or was 12 investing in all of the purchase of 13 Gator's, and Gator's construction was 14 going on at that time. So it did show 15 a profit, but it was a -- and I don't 16 recall what it was -- but it was not a 17 cash flow, a negative cash flow. 18 Q. Really, Mr. Goodwyn, let me ask you. 19 What I'm asking about are some numbers 20 on the bottom of the tax return. 21 MR. MEMORY: Listen, you 22 didn't ask for them. He's sitting 23 here doing the best that he can.</p>
<p style="text-align: right;">Page 15</p> <p>1 MR. MEMORY: Okay. Make it 2 short and move on. 3 THE WITNESS: All right. 4 MR. MEMORY: We're not 5 interested in the history. 6 A. It went -- we had very few customers. 7 The financial statements were in 8 trouble until we built it up to a 9 level of profitability. But we 10 started from very low and in serious 11 debt, and then we pulled it -- I 12 pulled it out of debt over the three 13 years. 14 Q. (BY MR. HAMM) Did Simple Pleasures, 15 Incorporated file tax returns for the 16 years of '93, '94, and '95? 17 A. Correct. 18 Q. Okay. What would be the net income 19 for Simple Pleasures, Incorporated in 20 those three years, that you recall? 21 A. Big losses, losses in '92, '93 and 22 profit in '94 -- or '93, '94, and 23 profits in '95. It would be the third</p>	<p style="text-align: right;">Page 17</p> <p>1 MR. HAMM: If he recalls. 2 I'm asking for those numbers. 3 A. I don't know. I don't know. I can't 4 recall exactly. 5 Q. (BY MR. HAMM) You don't recall the 6 numbers? 7 A. I do not recall what they were, no. 8 MR. MEMORY: Sitting there 9 lecturing him. 10 Q. (BY MR. HAMM) You feel that '95 was 11 profitable? 12 A. It was profitable, correct. There's a 13 difference in cash flow and 14 profitable. We were spending cash 15 developing Gator's at the same time we 16 were making a profit. We were out 17 spending our profit. Was cash flow 18 positive during '95, no. 19 Q. You were devoting -- any profit that 20 may have stemmed, you were devoting it 21 to the new location, Gator's? 22 A. Absolutely. 23 Q. Okay. And do you have any idea as to</p>

5 (Pages 14 to 17)

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PHILLIP GOODWYN - 2/17/2006

<p style="text-align: right;">Page 18</p> <p>1 what money that may have been?</p> <p>2 A. No.</p> <p>3 Q. You indicated earlier that 1994 had a</p> <p>4 profit of \$60,000. Would it have been</p> <p>5 in that neighborhood or a greater</p> <p>6 amount?</p> <p>7 A. It would have been a greater amount.</p> <p>8 Q. And your position is that the Hillwood</p> <p>9 location was generating \$60,000, the</p> <p>10 profit, in '94 and a greater amount in</p> <p>11 '95?</p> <p>12 A. Something like that. I don't recall</p> <p>13 exactly.</p> <p>14 Q. Okay. Were you taking a salary out of</p> <p>15 the Hillwood location in '94 and '95?</p> <p>16 A. Yeah, I believe I was, yes.</p> <p>17 Q. So consequently, the \$60,000 and the</p> <p>18 greater figure for '95 would have been</p> <p>19 after your salary; is that correct?</p> <p>20 A. Yes, if it showed -- when it showed a</p> <p>21 profit of \$60,000, it would not have</p> <p>22 been a -- if when we showed a profit,</p> <p>23 it would not have been a cash flow</p>	<p style="text-align: right;">Page 20</p> <p>1 Hillwood, were absorbed by Simple</p> <p>2 Pleasures, Inc. and followed on to</p> <p>3 Gator's.</p> <p>4 Q. But there were unpaid obligations</p> <p>5 associated with the Hillwood location?</p> <p>6 A. Yes, there were still outstanding</p> <p>7 debts.</p> <p>8 Q. Were they just the trade payables, or</p> <p>9 --</p> <p>10 A. Trade payables, you know --</p> <p>11 Q. Anything in addition to that?</p> <p>12 A. It could have been some additional</p> <p>13 rent left. I don't know. It was just</p> <p>14 trades, trade payments.</p> <p>15 Q. I mean, would it have been routine</p> <p>16 rent or would it have been an</p> <p>17 arrearage?</p> <p>18 A. It may have been. I can't recall. We</p> <p>19 stayed --</p> <p>20 Q. I'm sorry?</p> <p>21 A. We stayed a little bit in arrears with</p> <p>22 Ed for years since we opened Hillwood.</p> <p>23 I've never been current.</p>
<p style="text-align: right;">Page 19</p> <p>1 profit because it would have been</p> <p>2 paying off debt. But, yes, we may</p> <p>3 have shown a profit during that time,</p> <p>4 60,000 plus my profit -- I would have</p> <p>5 had 30,000.</p> <p>6 Q. And your salary as you recall would</p> <p>7 have been a \$30,000 range?</p> <p>8 A. Uh-huh.</p> <p>9 Q. And then you opened Gator's in '90 --</p> <p>10 A. Or \$24,000, I think, at that time.</p> <p>11 Q. Then you opened Gator's?</p> <p>12 A. Right, correct.</p> <p>13 Q. In '96?</p> <p>14 A. I'd have to look at the lease. It was</p> <p>15 '95 and 6, something like that.</p> <p>16 Q. Do you recall what period of time that</p> <p>17 you ran these two businesses together?</p> <p>18 A. About six months.</p> <p>19 Q. Okay. And then you vacated Hillwood?</p> <p>20 A. Yes.</p> <p>21 Q. Was there any unpaid obligations from</p> <p>22 the Hillwood location as you recall?</p> <p>23 A. All of those -- any obligations,</p>	<p style="text-align: right;">Page 21</p> <p>1 Q. With respect to the Gator's location,</p> <p>2 what was your experience with -- or</p> <p>3 what was Simple Pleasures' experience</p> <p>4 with respect to its profitability in</p> <p>5 the year of '95, '96, '97, '98, those</p> <p>6 years?</p> <p>7 A. Until we expanded into the bar and</p> <p>8 made it larger, it was not -- it was</p> <p>9 marginally profitable based on lunch.</p> <p>10 But when we expanded the bar, it</p> <p>11 became much more profitable.</p> <p>12 Q. And can you give me a time frame for</p> <p>13 that?</p> <p>14 A. After two years, the second year.</p> <p>15 Q. '97, '98?</p> <p>16 A. '97, something like that.</p> <p>17 Q. And did there come a time that you</p> <p>18 wanted to get out of the restaurant</p> <p>19 business at the Vaughn Plaza, at the</p> <p>20 Gator's location?</p> <p>21 A. There was a time from the day I got</p> <p>22 into Hillwood that I wanted out, yes.</p> <p>23 Q. Okay. But my question with -- while</p>

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<p style="text-align: right;">Page 22</p> <p>1 you were in the Gator's location?</p> <p>2 A. From then on, since I've been in the</p> <p>3 restaurant business, I wanted out.</p> <p>4 Q. Okay. What did you do to get out?</p> <p>5 What efforts did you take to get out</p> <p>6 of this restaurant business?</p> <p>7 A. The wrong direction. I was trying to</p> <p>8 find managers and bring people in like</p> <p>9 Vince to buy the business or to take</p> <p>10 it over, to manage it, to become a</p> <p>11 partner, you know, and the deal would</p> <p>12 be they would come on and then they</p> <p>13 could end up getting or buying me out</p> <p>14 and I would leave. I found the</p> <p>15 restaurant business very difficult to</p> <p>16 maintain a family life the way I'd</p> <p>17 like to, so it was always a pursuit of</p> <p>18 trying to find somebody.</p> <p>19 But in lieu of that, what</p> <p>20 I ended up doing was, I was going to</p> <p>21 then expand it. I found it as running</p> <p>22 faster to generate more cash flow to</p> <p>23 keep creditors and to pay things back</p>	<p style="text-align: right;">Page 24</p> <p>1 A. Financial distress.</p> <p>2 Q. Well, I understand that's the result,</p> <p>3 but what factors? What factors caused</p> <p>4 you -- was it a threatened levy,</p> <p>5 seizure?</p> <p>6 A. I opened up a seafood market next</p> <p>7 door, and that drew down on me</p> <p>8 financially and very, very heavily.</p> <p>9 We had spent too much money, \$200,000,</p> <p>10 on it. We spent a lot of money on it.</p> <p>11 Theft, because of it, had me overly</p> <p>12 divided, and theft had run out of</p> <p>13 control. The management was out of</p> <p>14 control. And that's what drove the</p> <p>15 problem, and until I regained control</p> <p>16 and I reopened and let go of</p> <p>17 management, is when it came back to</p> <p>18 the financial profitability that it</p> <p>19 had shown prior to me opening that</p> <p>20 seafood market.</p> <p>21 Q. Let me see if I understand you. You</p> <p>22 closed in 2003, sometime during the</p> <p>23 2003 period.</p>
<p style="text-align: right;">Page 23</p> <p>1 and to try to be able to hire managers</p> <p>2 and get out that way.</p> <p>3 Q. You mentioned earlier that you were</p> <p>4 trying to find others that were to buy</p> <p>5 the business or come in.</p> <p>6 A. Like Hillwood, when I did Hillwood.</p> <p>7 Q. With respect to Gator's, did you go to</p> <p>8 any other people attempting to or</p> <p>9 solicit other offers on the purchase</p> <p>10 on the Gator's business?</p> <p>11 A. In 2003, when we closed, I did. I</p> <p>12 actively went out and tried to find</p> <p>13 people to purchase it.</p> <p>14 Q. Did you find anybody? Were there any</p> <p>15 offers tendered?</p> <p>16 A. There were no official offers</p> <p>17 tendered, no.</p> <p>18 Q. And this is in 2003 that you closed</p> <p>19 the business?</p> <p>20 A. Correct.</p> <p>21 Q. For what period of time was it closed?</p> <p>22 A. Two weeks.</p> <p>23 Q. And what was the reason it was closed?</p>	<p style="text-align: right;">Page 25</p> <p>1 A. October.</p> <p>2 Q. October of 2003. And you reopened and</p> <p>3 enjoyed a period of profitability?</p> <p>4 A. Correct. I reopened and was managing</p> <p>5 to pay back some of the IRS debts and</p> <p>6 some of my suppliers' debts, and we</p> <p>7 had regained profitability once I</p> <p>8 reopened, and almost virtually</p> <p>9 immediately once I reopened.</p> <p>10 Q. Following the reopening or following</p> <p>11 October 2003, did you go through any</p> <p>12 type of business reorganization or</p> <p>13 bankruptcy proceedings of any type</p> <p>14 with --</p> <p>15 A. I had begun discussing it with Von.</p> <p>16 When I closed, I had meetings with him</p> <p>17 regarding my options on bankruptcy or</p> <p>18 how to get this stuff paid back, but</p> <p>19 my goal was to take care of Ed</p> <p>20 Fatzinger and my debts to people that</p> <p>21 I had, debts to -- as to try to figure</p> <p>22 out how to get them taken care of.</p> <p>23 Q. There was no bankruptcy petition filed</p>

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<p style="text-align: right;">Page 26</p> <p>1 --</p> <p>2 A. No.</p> <p>3 Q. -- in October of 2003 for Simple</p> <p>4 Pleasures, Incorporated?</p> <p>5 A. No.</p> <p>6 Q. Has there ever been a bankruptcy</p> <p>7 petition involved for Simple</p> <p>8 Pleasures, Incorporated?</p> <p>9 A. There was -- we -- October of 2005.</p> <p>10 We had to go ahead and do bankruptcy</p> <p>11 because of the Region's.</p> <p>12 MR. MEMORY: Listen to his</p> <p>13 questions.</p> <p>14 THE WITNESS: Oh, I'm sorry.</p> <p>15 MR. MEMORY: He's asking about</p> <p>16 the corporation.</p> <p>17 THE WITNESS: The corporation,</p> <p>18 yes.</p> <p>19 Q. (BY MR. HAMM) But the bankruptcy in</p> <p>20 2005 was an individual bankruptcy; is</p> <p>21 that correct?</p> <p>22 A. Yes.</p> <p>23 Q. It was not for the corporation then?</p>	<p style="text-align: right;">Page 28</p> <p>1 A. No, they had not filed liens at that</p> <p>2 time, no.</p> <p>3 Q. Did the Internal Revenue Service file</p> <p>4 liens at some point in time?</p> <p>5 A. Yes, I believe so.</p> <p>6 Q. And -- you think so or you know so?</p> <p>7 A. I'm sure they did. I mean, I -- yes,</p> <p>8 I believe so.</p> <p>9 Q. Okay. Do you know how much the</p> <p>10 Internal Revenue Service claims they</p> <p>11 are owed today?</p> <p>12 A. I believe a total somewhere around</p> <p>13 \$80,000.</p> <p>14 Q. Has there been a responsible party</p> <p>15 assessment stemming from that</p> <p>16 withholding tax obligation against you</p> <p>17 personally?</p> <p>18 A. No.</p> <p>19 MR. MEMORY: He doesn't know</p> <p>20 what you're asking.</p> <p>21 THE WITNESS: Uh-uh.</p> <p>22 Q. (BY MR. HAMM) Did you understand my</p> <p>23 question about the responsible party</p>
<p style="text-align: right;">Page 27</p> <p>1 A. Not for the corporation. Sorry.</p> <p>2 Q. So in essence --</p> <p>3 A. No, and I don't know.</p> <p>4 Q. -- my question is: There has been no</p> <p>5 bankruptcy petition --</p> <p>6 A. No, no.</p> <p>7 Q. -- to Simple Pleasures, Incorporated?</p> <p>8 A. Correct.</p> <p>9 Q. You mentioned earlier some internal</p> <p>10 service or -- I'm sorry -- some debt</p> <p>11 to the Internal Revenue Service.</p> <p>12 A. Correct.</p> <p>13 Q. Tell me about this.</p> <p>14 A. Payroll and other -- the payroll tax</p> <p>15 not submitted on time or not sent --</p> <p>16 not the full amount from 2003.</p> <p>17 Q. That was a withholding tax obligation?</p> <p>18 A. Um-hmm.</p> <p>19 Q. Was there any income tax obligations?</p> <p>20 A. No.</p> <p>21 Q. Withholding loan. Were liens -- did</p> <p>22 the Internal Revenue Service file</p> <p>23 liens in this case?</p>	<p style="text-align: right;">Page 29</p> <p>1 assessment?</p> <p>2 A. No -- I mean, I guess I don't, really.</p> <p>3 Q. Has the IRS -- are they looking to you</p> <p>4 individually for the withholding taxes</p> <p>5 stemming from Simple Pleasures,</p> <p>6 Incorporated?</p> <p>7 A. Yeah, they're looking for me for the</p> <p>8 money, yes. Certainly, yeah.</p> <p>9 Q. In other words, Simple Pleasures,</p> <p>10 Incorporated is not the only one</p> <p>11 liable today?</p> <p>12 A. Correct, yes.</p> <p>13 Q. Phillip Goodwyn himself is liable</p> <p>14 also?</p> <p>15 A. Yes.</p> <p>16 Q. Okay. How about the Alabama State</p> <p>17 Department of Revenue? Are there any</p> <p>18 tax obligations?</p> <p>19 A. No.</p> <p>20 Q. How about Montgomery County?</p> <p>21 A. No.</p> <p>22 Q. City of Montgomery? Sales taxes paid?</p> <p>23 A. No. All sales taxes paid.</p>

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<p style="text-align: right;">Page 30</p> <p>1 Q. Have there ever been any liens or any 2 amounts owed those people beyond the 3 period of time in which they were to 4 be paid? 5 A. Have I -- I have with the State of 6 Alabama in the 2003. I owed them 7 \$2100, something like that, and I paid 8 it. 9 Q. Okay. Most of them have been paid in 10 a timely fashion that would prevent a 11 lien from being filed; is that 12 correct? 13 A. Absolutely. 14 Q. Okay. And the Internal Revenue 15 Services is, as far as you know today, 16 are the only one that has filed a 17 lien? 18 A. Correct. 19 Q. You have filed a lawsuit. Have you 20 had an opportunity to review the 21 lawsuit -- 22 A. Yes. 23 Q. -- that has been filed in this case?</p>	<p style="text-align: right;">Page 32</p> <p>1 A. The contract -- Vince and I sat down 2 on the 24th. He brought in this 3 contract. He'd been frustrated we had 4 not -- the attorneys had not gotten 5 all together on everything. He wanted 6 to take control of the business. I 7 wanted him to take control of the 8 business. We were waiting for the 9 inevitable from the IRS and from 10 Region's. They were willing, by all 11 indications, were -- had expressed 12 willingness to meet us on the 13 agreement to the \$30,000 for each, and 14 Ed Fatzinger is -- my understanding 15 and I had spoken to Ed, that he was in 16 all -- full agreement with this -- 17 with this contract. 18 Q. Hold on. That's Mr. Memory's. Go 19 ahead. Keep talking. 20 A. And all that we were going to be 21 waiting for is he -- I was giving him 22 the keys and we were going to be 23 waiting for getting the full release,</p>
<p style="text-align: right;">Page 31</p> <p>1 A. Um-hmm. 2 Q. And you have read the lawsuit? 3 A. Yes. 4 Q. Do you understand what is being said 5 in this lawsuit? 6 A. Um-hmm. 7 Q. Let me ask you some questions about 8 this lawsuit. You have alleged a 9 breach of contract that Mr. Saele and 10 V Restaurants, Incorporated -- 11 A. Correct. 12 Q. -- have breached a contract, an 13 agreement, that you had with them -- 14 A. Um-hmm. 15 Q. -- you and Simple Pleasures, 16 Incorporated had with them. Can you 17 tell me how that occurred and what 18 facts you know about that? 19 A. There were -- I hired or requested 20 Vince come in as a -- you want just 21 the contract, discuss just the 22 contract? 23 Q. I want what facts support --</p>	<p style="text-align: right;">Page 33</p> <p>1 and I was going to be responsible for 2 making sure that he had full release. 3 4 (Whereupon, Exhibit No. 1 was marked 5 for identification.) 6 7 Q. (BY MR. HAMM) Let me show you an item 8 that I have marked as Exhibit No. 1. 9 Does that document look familiar to 10 you? 11 A. Yes. 12 Q. Can you tell me what that -- 13 A. This is an agreement that Vince, with 14 V Restaurants, and I, representing 15 Simple Pleasures, Inc., were in 16 agreement to. 17 Q. And is that your signature on the 18 bottom or -- 19 A. Yes, it is. 20 Q. -- or half way down the second page? 21 A. Yes, that's mine. 22 Q. Okay. 23 MR. HAMM: Mr. Yarbrough, this</p>

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<p style="text-align: right;">Page 34</p> <p>1 is the copy of the --</p> <p>2 MR. YARBROUGH: Yeah, I've got</p> <p>3 it.</p> <p>4 MR. HAMM: You've got a copy?</p> <p>5 MR. YARBROUGH: That's the</p> <p>6 same thing that was just introduced in</p> <p>7 the other deposition, isn't it, 24th</p> <p>8 letter?</p> <p>9 MR. HAMM: Yeah.</p> <p>10 Q. (BY MR. HAMM) Mr. Goodwyn, you're</p> <p>11 signing for Simple Pleasures,</p> <p>12 Incorporated down here at the bottom</p> <p>13 of this document?</p> <p>14 A. Right.</p> <p>15 Q. And is it this agreement, dated</p> <p>16 September the 24th, 2004, which is</p> <p>17 marked as Exhibit No. 1, is this the</p> <p>18 agreement -- is this the agreement</p> <p>19 that you and Mr. Saele had?</p> <p>20 A. Correct.</p> <p>21 Q. Acting on behalf of each of your</p> <p>22 corporations?</p> <p>23 A. Correct.</p>	<p style="text-align: right;">Page 36</p> <p>1 did it in his behalf. And I did</p> <p>2 express at that time that I had one</p> <p>3 wedding obligation that I had to make</p> <p>4 sure, and he had to fulfill these</p> <p>5 other -- he had to fulfill these other</p> <p>6 catering jobs that were coming up, and</p> <p>7 then he would pay me a percentage for</p> <p>8 helping him execute those catering</p> <p>9 jobs.</p> <p>10 So that was another</p> <p>11 agreement that we both -- we were on</p> <p>12 the understanding that I was going to</p> <p>13 help him finish these because that was</p> <p>14 my reputation. I had taken those</p> <p>15 catering parties, and I wasn't going</p> <p>16 to let them just kind of be not</p> <p>17 overseen.</p> <p>18 Q. Was that agreement, with respect to</p> <p>19 the catering that you just described,</p> <p>20 was it before September the 24th or</p> <p>21 after September the 24th?</p> <p>22 A. Well, it was a -- it was before</p> <p>23 September 24th when he discussed this</p>
<p style="text-align: right;">Page 35</p> <p>1 Q. Is it this agreement that was</p> <p>2 breached?</p> <p>3 A. Yes.</p> <p>4 Q. Okay. Were there -- are there any</p> <p>5 other terms other than what is</p> <p>6 reflected in this document to y'all's</p> <p>7 agreement?</p> <p>8 A. When we were discussing leading up to</p> <p>9 this document, when we were working on</p> <p>10 past agreements so implied or</p> <p>11 discussed, we were lining out areas</p> <p>12 that I would be allowed to go into in</p> <p>13 order to make a living and the</p> <p>14 original documents which referenced</p> <p>15 any food service, and that's where we</p> <p>16 had problems, and it turned out that</p> <p>17 Vince and I were in a complete</p> <p>18 understanding that existing Gator's</p> <p>19 customers, ones that I had done</p> <p>20 catering for in the past, any existing</p> <p>21 clients, that they were actually</p> <p>22 actively doing any catering for, that</p> <p>23 I would not do any work for unless I</p>	<p style="text-align: right;">Page 37</p> <p>1 and that we had discussed that he</p> <p>2 needed help for these parties, and</p> <p>3 that he was going to pay me a</p> <p>4 percentage to handle it. That was the</p> <p>5 only way, because otherwise he didn't</p> <p>6 want me involved in the restaurant,</p> <p>7 and I didn't want to be involved in</p> <p>8 the restaurant. He needed to take it</p> <p>9 over.</p> <p>10 Q. With respect to the catering, the</p> <p>11 other agreement that you're speaking</p> <p>12 of --</p> <p>13 A. Correct.</p> <p>14 Q. -- is it addressed in this September</p> <p>15 24th, 2004 agreement?</p> <p>16 A. Yeah, in that it says that catering</p> <p>17 business operating out of Gator's</p> <p>18 shall continue but only be operated by</p> <p>19 its new owners.</p> <p>20 Q. Okay. And were you satisfied with</p> <p>21 that?</p> <p>22 A. Am I satisfied with that?</p> <p>23 Q. Were you satisfied with that on</p>

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<p style="text-align: right;">Page 38</p> <p>1 September the 24th, 2004?</p> <p>2 A. I was satisfied with the fact that we</p> <p>3 both had it clear in our head. We</p> <p>4 understood that this couldn't cover</p> <p>5 every contingency. We didn't have,</p> <p>6 really, lawyers sitting there bringing</p> <p>7 it up, but in our head we had clear --</p> <p>8 he wanted to make sure that the</p> <p>9 profitability of what he saw of</p> <p>10 Gator's, that I was not going to</p> <p>11 undermine his business. And my job</p> <p>12 was -- and in my head I was going to</p> <p>13 do nothing to undermine his business,</p> <p>14 and that is my -- I was not going to</p> <p>15 go into business against him, taking</p> <p>16 his customers, and that was our</p> <p>17 intention. And was that addressed?</p> <p>18 Was it specifically word for word? Is</p> <p>19 that what's right here? That's what</p> <p>20 our intentions, and that's what the</p> <p>21 discussions between us were, and</p> <p>22 that's what I was holding myself to.</p> <p>23 Does that answer your question?</p>	<p style="text-align: right;">Page 40</p> <p>1 we had discussed at that time that it</p> <p>2 would come when it comes; that I would</p> <p>3 do everything so he could operate it</p> <p>4 with no hindrances, and that's what I</p> <p>5 was doing.</p> <p>6 Q. Now, when you say operating with no</p> <p>7 hindrance, he was doing that at the</p> <p>8 time, was he not, or thereabouts?</p> <p>9 A. No, he wasn't operating -- I mean, he</p> <p>10 was not operating it, the business,</p> <p>11 until the day -- I mean, he had been</p> <p>12 in there helping his manager and doing</p> <p>13 other things, but he wasn't the man in</p> <p>14 control of all the deposits, of the</p> <p>15 money, of all that.</p> <p>16 Q. When did that occur?</p> <p>17 A. August -- September 24th.</p> <p>18 Q. Okay. I get it. Maybe we're talking</p> <p>19 beyond each other, but it occurred on</p> <p>20 or about September 24th that Mr. Saele</p> <p>21 took over the business --</p> <p>22 A. Correct.</p> <p>23 Q. -- is that correct? Okay. So is it</p>
<p style="text-align: right;">Page 39</p> <p>1 Q. Well, if that's your answer, it</p> <p>2 answers my question.</p> <p>3 A. Um-hmm.</p> <p>4 Q. The -- were there any matters</p> <p>5 unresolved on September the 24th,</p> <p>6 2004? Maybe that's the way I should</p> <p>7 ask the question.</p> <p>8 A. That we had left -- no, not that I</p> <p>9 know of specifically, except for the</p> <p>10 fact that we said we couldn't transfer</p> <p>11 title, which was not important -- or</p> <p>12 not title, but we couldn't transfer</p> <p>13 money until I was able to deliver him</p> <p>14 clear title to the equipment.</p> <p>15 Q. Okay. I'm going to cover that. I</p> <p>16 understand how that would be a factor,</p> <p>17 but that is addressed in this document</p> <p>18 on -- dated September the 24th also, I</p> <p>19 believe.</p> <p>20 A. Right. But it was -- but we had had</p> <p>21 an understanding that that would come</p> <p>22 when it would come; that there was no</p> <p>23 -- although it requests a closing day,</p>	<p style="text-align: right;">Page 41</p> <p>1 your understanding that paragraph</p> <p>2 number four of Exhibit No. 1 was</p> <p>3 somewhat ambiguous between the two of</p> <p>4 you, or does it -- did you not agree</p> <p>5 to this?</p> <p>6 MR. MEMORY: Object to the</p> <p>7 form. Calls for legal conclusion. Go</p> <p>8 ahead and you can answer it if you</p> <p>9 can.</p> <p>10 A. It was to me, at the time of this,</p> <p>11 irrelevant in a point because what was</p> <p>12 our intentions? Our intentions were</p> <p>13 he was going to get a good deal. He</p> <p>14 was -- I was going to assist him and</p> <p>15 have everything he needed to operate</p> <p>16 that business; that nothing would</p> <p>17 hinder his operation of the business;</p> <p>18 and that he would get complete and</p> <p>19 total access and be able to keep the</p> <p>20 equipment and everything in place;</p> <p>21 that nothing would hinder the</p> <p>22 purchase.</p> <p>23 Q. (BY MR. HAMM) Okay.</p>

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1 A. All right? And that -- this, to me,
2 in some respects was just clarifying
3 what our obligations were, and our
4 obligations were: He was to hand me
5 the money. He was to make a deal with
6 Ed, and I would deliver him everything
7 in my power.

8 Q. Okay. In your deposition -- have you
9 had an opportunity to review your
10 deposition --

11 A. Um-hmm.

12 Q. -- given previously --

13 A. Right.

14 Q. -- when Mr. Yarbrough took it?

15 A. Um-hmm.

16 Q. Did you review that?

17 A. I read through it quickly.

18 Q. There were some suggestions, or
19 actually statements, that an agreement
20 was -- occurred on 27th, 2004. Was
21 there any agreement subsequent to this
22 September the 24th, 2004 document?

23 A. Between Vince and I?

Page 43

1 Q. Um-hmm.

2 A. Now, there was a lease on September
3 27th, I think, between Vince and
4 Spectrum.

5 MR. HAMM: What page was this?

6 MR. YARBROUGH: Yeah, it's
7 first reference, page 28 beginning on
8 line 12.

9 Q. (BY MR. HAMM) I'm looking at page 28.

10 A. That would have been September the
11 24th.

12 Q. Okay.

13 A. I mean, it may have been Friday. It's
14 Friday I stated earlier.

15 Q. So the September 27th date was an
16 error on --

17 A. It's just a -- yeah.

18 Q. -- someone's part, either yours or
19 perhaps a court reporter?

20 A. Right.

21 Q. Okay. It should have been September
22 the 24th?

23 A. Correct.

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1 Q. Okay. Very well. I just wanted to
2 clear that point up. There was no
3 agreement subsequent to September the
4 24th?

5 A. No.

6 Q. Okay. Good. Do you have any
7 indication that Vince Saele would not
8 have paid you \$90,000?

9 A. When he's going to pay me the 60 and
10 -- no.

11 Q. The purchase price --

12 A. No.

13 Q. The consideration would have come
14 across --

15 A. Absolutely not.

16 Q. -- with respect to the 90,000; is that
17 correct?

18 A. No. I had no indication anyway.

19 Q. And that is not a basis for your claim
20 with breach of contract, is it, that
21 he didn't have the \$90,000 or didn't
22 have the resources to do this, is it?

23 A. No, that's not. It's the letter.

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1 Q. Okay.

2 A. I had no indication he was going to
3 breach the contract until Von called
4 me.

5 Q. Tell me how he breached this contract.
6 And the contract we're speaking of and
7 you're suing about is this September
8 24th, 2004 contract.

9 A. His attorney sent a letter to Von
10 saying he wasn't going to fulfill the
11 contract.

12 Q. Okay. But my question -- the contract
13 that you're suing on, is this the
14 agreement of September the 24th of
15 2004?

16 A. Correct, or our agreement to fulfill
17 his payment to me.

18 Q. Okay. When did you get notice of the
19 breach of the contract? When were you
20 informed that Vince Saele --

21 A. Whatever date that Von was aware of
22 that they called me to tell me. Vince
23 never called me to say there was a

12 (Pages 42 to 45)

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<p style="text-align: right;">Page 46</p> <p>1 problem, we were running in trouble, 2 because I need to have this -- we have 3 a timeline. There was no discussion 4 that I was in any way, form, or 5 fashion creating any problem or 6 hindrance to him or that he was having 7 a problem and was going to breach the 8 contract. No one called, said 9 anything that there was a problem. 10 Q. Well, with respect to paragraph four 11 on the October 22nd, 2004 date, you 12 did not regard that as being a 13 condition of the contract? 14 A. It wasn't relevant to him operating 15 the business, so I had delivered him 16 -- the business had delivered 17 everything. It was not -- in other 18 words, the business wouldn't shut down 19 operation. He wouldn't lose anything. 20 There was nothing -- there was nothing 21 hindering him, so it was irrelevant as 22 far as I was concerned. I had signed 23 over -- went to the ABC board, signed</p>	<p style="text-align: right;">Page 48</p> <p>1 Q. Did he -- were you under any kind of 2 duress on September the 24th, 2004, 3 when you executed -- 4 A. Why did I -- 5 Q. No. Were you in any kind of duress? 6 Did anything force you to sign? 7 A. No. 8 Q. No one forced you to sign this 9 document? 10 A. No. 11 Q. Did anyone prevent you from reading 12 this document before you signed it? 13 A. No. 14 Q. And you were not incapacitated in any 15 matter, and you understood what you 16 were signing; is that correct? 17 A. Correct. 18 Q. But you just did not feel the October 19 27th -- I'm sorry -- October 22nd, 20 2004 date was operative? 21 A. I don't know if I looked back -- 22 reading back over it, I don't think I 23 was much aware of that date after the</p>
<p style="text-align: right;">Page 47</p> <p>1 over phone numbers, given anything -- 2 anything he'd ask for he got. 3 Q. Well, let me ask: On September the 4 24th, where was this contract signed 5 by you and Mr. Saele? 6 A. In the office at Gator's. It's a -- 7 Q. Did you have an attorney prior to this 8 date, September 24th, 2004? 9 A. I did. 10 Q. And let me ask: Who was that 11 attorney? 12 A. Von Memory. 13 Q. Was Mr. Memory present during that 14 meeting? 15 A. No, no, he was not. 16 Q. Okay. Were you precluded from talking 17 with Mr. Memory on that day, September 18 the 24th, 2004, or prior to signing 19 this document? 20 A. On this -- he was -- he was out of 21 town or unavailable, and I was 22 probably in poor judgment signing 23 anything without an attorney present.</p>	<p style="text-align: right;">Page 49</p> <p>1 fact. I didn't look back at this 2 document each week to say where are we 3 on time. I had turned over everything 4 for his operation. He was operating. 5 There were no hindrances. We were -- 6 I had spoken to him a number of times 7 saying we're getting ready to get 8 these documents back for full release, 9 so I had told Vince that we were just 10 waiting on this. There is no problem. 11 Q. Let me ask: Had Region's agreed to 12 accept \$30,000 at -- let's say 13 September the 24th, 2004? 14 A. We have a formal at a particular time. 15 Q. I'm sorry? 16 A. There was a formal agreement at a 17 particular time, but we had had 18 discussions that they would -- that it 19 would -- in all likelihood they were 20 going to accept the \$30,000. 21 Q. When did you have a definitive 22 agreement from Region's Bank that they 23 would accept 30,000 and release</p>

13 (Pages 46 to 49)

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<p style="text-align: right;">Page 50</p> <p>1 whatever claims they had to the 2 equipment and the furniture and 3 fixtures? 4 A. Two weeks or something after this, I'm 5 not sure, we had a document to -- 6 Q. There was a letter coming from 7 Region's -- 8 A. Correct. 9 Q. -- telling you such? 10 A. Yes, there's a letter. 11 Q. Okay. That upon payment of \$30,000 12 they would release -- 13 A. Correct. 14 Q. -- their claims to the furniture and 15 fixtures within the Gator's 16 restaurant? 17 A. Correct. 18 Q. With respect to the Internal Revenue 19 Service, when did you receive 20 indication that they would release 21 their claims too? 22 A. I recall somewhere in November, 23 mid-November.</p>	<p style="text-align: right;">Page 52</p> <p>1 would release their claim to this 2 furniture and fixtures? 3 A. Not that I know of. 4 Q. Let me ask you this: Do you continue 5 to get correspondence from the 6 Internal Revenue Service -- 7 A. Yes. 8 Q. -- even today? 9 A. Correct. 10 Q. Even though you've executed the 2848 11 with your counsel; is that correct? 12 A. Yes. 13 Q. Or you've executed 2848 to the 14 Internal Revenue Service? 15 A. Yes. 16 Q. You still get all correspondence from 17 the Internal Revenue Service, don't 18 you? 19 A. Yes, right. 20 Q. Have you ever received a letter from 21 the Internal Revenue Service saying 22 that they would release the lien? 23 A. No, not that I know of.</p>
<p style="text-align: right;">Page 51</p> <p>1 Q. Did you receive a formal document -- a 2 document from the Internal Revenue 3 Service? 4 A. I wasn't -- that was being handled by 5 my attorney. 6 Q. Okay. Have you been informed or has 7 Simple Pleasures been informed? 8 MR. MEMORY: Don't go out that 9 way. 10 A. No -- I mean, I don't know. 11 MR. MEMORY: You can't talk 12 about what the two of us talk about. 13 THE WITNESS: Right. 14 A. I don't know what transpired between 15 my attorney and the IRS exactly. 16 Q. (BY MR. HAMM) Did you give the 17 Internal Revenue Service 2848 for your 18 authorizing them to work with your 19 counsel? 20 A. Yes. 21 Q. Okay. Did the Internal Revenue 22 Service send you a letter spelling out 23 or detailing any terms upon which they</p>	<p style="text-align: right;">Page 53</p> <p>1 Q. Okay. Let me ask: On October the 2 22nd or November the 15th or any date 3 subsequent to that, how did you plan 4 to carry this transaction out? 5 A. We were waiting for their approval of 6 acceptance of the offer, which we had 7 been given some reason that they would 8 be looking at it favorably. 9 Q. How did you anticipate this 10 transaction taking place? I mean, 11 would it be with Mr. Saele paying 12 \$60,000 cash, and you heard the 13 testimony earlier, him assuming a note 14 of \$30,000 -- 15 A. Correct. 16 Q. -- and that money being held someplace 17 pending IRS approval? 18 A. No. I was planning to sit down with 19 the attorneys. He hands over the 20 check, we hand over the release of the 21 equipment from anything. 22 Q. So you expected the Internal Revenue 23 Service to release their lean prior to</p>

14 (Pages 50 to 53)

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1 receiving \$30,000?
 2 A. Or a letter of acceptance of some
 3 sort. We had the letter of acceptance
 4 from Region's, and I was waiting for
 5 that.
 6 Q. Had Spectrum Development agreed to
 7 accept the \$30,000 in --
 8 A. Yes, it was --
 9 Q. It was a note; is that correct?
 10 A. A note.
 11 Q. And they had agreed to that?
 12 A. They agreed to accept what Region's
 13 and the IRS were getting, and that was
 14 \$30,000.
 15 Q. And would that serve to release you
 16 from the entire lease arrearage?
 17 A. Yes.
 18 Q. Personally?
 19 A. Along with an additional five-year
 20 lease from the restaurants from a --
 21 Q. Okay. Following September the 24th,
 22 2004, did you receive any revenues
 23 from the business?

Page 55

1 A. Only in terms of percentages of
 2 catering.
 3 Q. Okay. And is it your position today
 4 that you're entitled to revenues from
 5 the business subsequent to September
 6 the 24th, 2004, you or Simple
 7 Pleasures, Incorporated?
 8 A. Well, Simple Pleasures is still owed
 9 for all the equipment and all the --
 10 what it gave at that particular time.
 11 I mean, because it was used.
 12 Q. Okay. But with respect to your claim
 13 against the profits of the business,
 14 is it your position in this lawsuit
 15 that you're entitled to the revenues
 16 from the -- stemming from the
 17 operation of the business subsequent
 18 to -- I mean after September the 24th,
 19 2004?
 20 A. It's -- I'm in the opinion that Simple
 21 Pleasures, Inc. owns that business and
 22 everything in it, and whatever it was
 23 doing and the profit from it more than

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1 V Restaurants has --
 2 Q. Okay.
 3 A. -- does, has title to it. As far as
 4 I'm concerned, it, V Restaurants,
 5 never executed their part of the deal
 6 where, yet, Simple Pleasures did.
 7 Q. And you've heard testimony earlier
 8 about a landlord foreclosing liens?
 9 A. I understand.
 10 Q. Are you -- do you question that or are
 11 you challenging that process here
 12 today as far as your lawsuit?
 13 A. I am challenging that that process
 14 happened because Vince said he was not
 15 from V Restaurants, did not fulfill
 16 his part of the agreement.
 17 Q. I'm looking at paragraph eight of
 18 Exhibit No. 1, and it speaks of the
 19 remaining 30,000. I presume --
 20 A. Um-hmm.
 21 Q. -- that 30,000 -- 60,000 cash coming
 22 in from Mr. Saele, 30,000 would go to
 23 Region's; is that correct?

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1 A. Correct.
 2 Q. And 30,000 would go to the Internal
 3 Revenue Service?
 4 A. Correct.
 5 Q. For the release of all liens that they
 6 may have against Phillip?
 7 A. Um-hmm.
 8 Q. That would be you; is that correct?
 9 A. Correct.
 10 Q. Individually or the business?
 11 A. Um-hmm.
 12 Q. Have you been successful today in
 13 getting your individual tax -- any
 14 lien that may be filed against you
 15 individually released?
 16 A. No.
 17 Q. Okay. Those tax liens remain; is that
 18 correct?
 19 A. Correct.
 20 Q. Even today?
 21 A. Um-hmm.
 22 Q. You had a tax obligation of over
 23 \$30,000 to the Internal Revenue

15 (Pages 54 to 57)

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<p style="text-align: right;">Page 58</p> <p>1 Service; is that correct?</p> <p>2 A. Correct.</p> <p>3 Q. Had you filed any type of Offer in</p> <p>4 Compromise or directed your attorney</p> <p>5 to file an Offer in Compromise with</p> <p>6 the Internal Revenue Service?</p> <p>7 A. I believe we made an offer.</p> <p>8 Q. Okay. And have you received a -- an</p> <p>9 acceptance of that offer for you</p> <p>10 personally, let me begin with.</p> <p>11 A. I believe that the direction that we</p> <p>12 were taking at this time prior to them</p> <p>13 not doing it is different than the</p> <p>14 direction that we are in presently.</p> <p>15 Q. Let me ask you: Did you file an Offer</p> <p>16 in Compromise with the Internal</p> <p>17 Revenue Service? Did you or -- did</p> <p>18 you instruct your attorneys to file an</p> <p>19 Offer in Compromise with the Internal</p> <p>20 Revenue Service?</p> <p>21 A. Yes, I instructed my attorney.</p> <p>22 Q. Are you aware -- had there been any</p> <p>23 other efforts to compromise this</p>	<p style="text-align: right;">Page 60</p> <p>1 unless the Internal Revenue Service</p> <p>2 released the business and you?</p> <p>3 A. Correct.</p> <p>4 Q. And you're -- what's the progress on</p> <p>5 your efforts to reduce that liability</p> <p>6 today? What has occurred?</p> <p>7 A. I've not made any arrangements at this</p> <p>8 time.</p> <p>9 Q. Have you attempted anything?</p> <p>10 A. No.</p> <p>11 Q. Okay. Did you read paragraph number</p> <p>12 nine?</p> <p>13 A. Um-hmm.</p> <p>14 Q. Did you discern from that that maybe</p> <p>15 some of the terms and conditions of</p> <p>16 this letter are not -- are not</p> <p>17 intended by the parties to be engraved</p> <p>18 in stone or by any --</p> <p>19 A. The -- I guess with my naive behavior,</p> <p>20 I felt like what we were discussing</p> <p>21 here was the sale of the business, an</p> <p>22 operating entity that was capable of</p> <p>23 operating, and that's what I was</p>
<p style="text-align: right;">Page 59</p> <p>1 liability other than through the</p> <p>2 Offer-in-Compromise program?</p> <p>3 A. No.</p> <p>4 Q. Okay. Are you sitting here today</p> <p>5 suggesting that the liability, as</p> <p>6 assessed, as indicated by the Internal</p> <p>7 Revenue Service, is incorrect; that</p> <p>8 you don't owe that much money?</p> <p>9 A. No, I wouldn't say.</p> <p>10 Q. In other words, you owed more than</p> <p>11 \$30,000?</p> <p>12 A. Correct.</p> <p>13 Q. And you have not attempted to reduce</p> <p>14 that liability, or get that liability</p> <p>15 reduced through any other means other</p> <p>16 than the Offer in Compromise; is that</p> <p>17 correct?</p> <p>18 A. Correct.</p> <p>19 Q. You haven't challenged the underlying</p> <p>20 assessment, have you?</p> <p>21 A. No.</p> <p>22 Q. So consequently, there would have been</p> <p>23 a balance even greater remaining</p>	<p style="text-align: right;">Page 61</p> <p>1 giving him.</p> <p>2 Q. Had there -- prior to September the</p> <p>3 24th, had there been discussions</p> <p>4 between yourself and Mr. Saele and/or</p> <p>5 your counsel, being Mr. Memory, I take</p> <p>6 it; is that correct?</p> <p>7 A. Correct.</p> <p>8 Q. And Mr. Buster Russell about the sale</p> <p>9 of this business?</p> <p>10 A. Yes.</p> <p>11 Q. Had there been correspondence between</p> <p>12 the attorneys?</p> <p>13 A. Yes.</p> <p>14 Q. And discussions between the two of</p> <p>15 you, Mr. Goodwyn and -- being Mr.</p> <p>16 Goodwyn yourself and Mr. Saele?</p> <p>17 A. Yes.</p> <p>18 Q. Okay. How long had that been going</p> <p>19 on?</p> <p>20 A. Probably six weeks.</p> <p>21 Q. Okay. And did you want this sale to</p> <p>22 -- or this transfer to occur as</p> <p>23 promptly as possible?</p>

16 (Pages 58 to 61)

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<p style="text-align: right;">Page 62</p> <p>1 A. Yes.</p> <p>2 Q. Was it your opinion that Mr. Saele</p> <p>3 wanted this transfer or sale to occur</p> <p>4 as promptly as possible?</p> <p>5 A. Yes.</p> <p>6 Q. Do you doubt on September the 24th,</p> <p>7 2004, that Vince Saele wanted to go</p> <p>8 through with this transaction?</p> <p>9 A. No.</p> <p>10 Q. What would have changed his mind or do</p> <p>11 you know of anything that would have</p> <p>12 changed his mind? What do you know</p> <p>13 today?</p> <p>14 MR. MEMORY: Object to the</p> <p>15 form. You can't look in his mind and</p> <p>16 answer that question.</p> <p>17 Q. (BY MR. HAMM) Have you got any</p> <p>18 information other than the letter from</p> <p>19 Mr. Buster Russell that was presented</p> <p>20 a few moments ago that was shown as</p> <p>21 Exhibit 3 in the Vince Saele</p> <p>22 deposition, anything other than this</p> <p>23 document saying that Mr. Saele does</p>	<p style="text-align: right;">Page 64</p> <p>1 Q. Well, why don't you read paragraph</p> <p>2 number 21 and 22 of the lawsuit</p> <p>3 itself, the complaint itself -- I'm</p> <p>4 sorry, paragraph 27 through 31.</p> <p>5 A. (Witness complies.) Okay.</p> <p>6 Q. How did Mr. Saele take this business</p> <p>7 from you? Explain to me.</p> <p>8 A. He refused to pay for what he agreed</p> <p>9 to pay for.</p> <p>10 Q. Did you give him the keys to the</p> <p>11 location?</p> <p>12 A. Absolutely.</p> <p>13 Q. And did he commence the operation of</p> <p>14 the business?</p> <p>15 A. Yes, he continued operations.</p> <p>16 Q. Are you suggesting that on September</p> <p>17 the 24th he had a plan to somehow take</p> <p>18 this business from you?</p> <p>19 A. I can't read into his mind.</p> <p>20 Q. Okay. Have you got any evidence of</p> <p>21 that, anything other than your</p> <p>22 conclusions at this moment just before</p> <p>23 that?</p>
<p style="text-align: right;">Page 63</p> <p>1 not wish to go through with the</p> <p>2 transaction?</p> <p>3 A. No.</p> <p>4 Q. Okay. And do you know of anything</p> <p>5 other than that indicating to you that</p> <p>6 -- I asked you if you had anything</p> <p>7 other than that document, item No. 3.</p> <p>8 But do you know of anything else that</p> <p>9 would have indicated to you that</p> <p>10 Mr. Saele did not wish to go through</p> <p>11 with this transaction?</p> <p>12 A. No.</p> <p>13 Q. Okay. And Mr. Saele's failure to</p> <p>14 follow through with this transaction</p> <p>15 is the sole basis for your breach of</p> <p>16 contract?</p> <p>17 A. Correct.</p> <p>18 Q. Okay. With respect to conversion, you</p> <p>19 have alleged a claim of conversion.</p> <p>20 First, do you understand what we mean</p> <p>21 or what is meant by the term</p> <p>22 "conversion"?</p> <p>23 A. No. What do you mean by conversion?</p>	<p style="text-align: right;">Page 65</p> <p>1 MR. MEMORY: Object to the</p> <p>2 form.</p> <p>3 Q. (BY MR. HAMM) Have you got anything</p> <p>4 that would say to you or suggest to</p> <p>5 you that Mr. Saele --</p> <p>6 A. Only by what happened and them pulling</p> <p>7 the contract, by not mentioning</p> <p>8 anything, not saying, "Hey, I need</p> <p>9 to -- we need to get something in</p> <p>10 writing on these things, otherwise I'm</p> <p>11 going to pull -- I'm not going to pay</p> <p>12 you." There was no attempt to</p> <p>13 reconcile any differences in any</p> <p>14 problems. Where I was proceeding as</p> <p>15 though everything was fine -- because</p> <p>16 it was. He had full operations. He</p> <p>17 had everything he needed. I was under</p> <p>18 no idea that in any way, form, or</p> <p>19 fashion he could have been hindrance</p> <p>20 (sic), and he wasn't. He had no --</p> <p>21 nothing was taking his equipment.</p> <p>22 Nothing was stopping him, so how was I</p> <p>23 not delivering? And so I was</p>

17 (Pages 62 to 65)

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<p style="text-align: right;">Page 66</p> <p>1 expecting him to do the same.</p> <p>2 Q. But -- so is it fair to say that by</p> <p>3 Mr. Saele and V Restaurants,</p> <p>4 Incorporated not following through</p> <p>5 with the contract, that they have</p> <p>6 converted your restaurant to their own</p> <p>7 use?</p> <p>8 A. Correct.</p> <p>9 Q. Okay. And that is the manner by which</p> <p>10 they took this business from you?</p> <p>11 A. Their refusal to pay then made it --</p> <p>12 made me not be able to make my</p> <p>13 obligations to Spectrum, which was to</p> <p>14 deliver the \$30,000 contract</p> <p>15 between --</p> <p>16 Q. Well, the contract was coming from</p> <p>17 Mr. Saele, was it not?</p> <p>18 A. Right. But I was delivering him in</p> <p>19 full, and he was coming with the</p> <p>20 money. I had told him that Vince was</p> <p>21 in agreement to sign this. He was</p> <p>22 paying me \$60,000, which would deliver</p> <p>23 then the equipment to Spectrum.</p>	<p style="text-align: right;">Page 68</p> <p>1 A. Right.</p> <p>2 Q. Is that -- his failure to follow</p> <p>3 through with the agreement on</p> <p>4 September 24 --</p> <p>5 MR. MEMORY: No, no. He's</p> <p>6 answered that twice as to what -- I</p> <p>7 know what you want to get at him, but</p> <p>8 --</p> <p>9 MR. HAMM: No. Tell me.</p> <p>10 MR. MEMORY: Exactly. That</p> <p>11 it's not the basis just to the</p> <p>12 contract, that there's more to it than</p> <p>13 that.</p> <p>14 Q. (BY MR. HAMM) Well, if there is,</p> <p>15 please tell me. That's what I'm</p> <p>16 asking.</p> <p>17 MR. MEMORY: Answer his</p> <p>18 question.</p> <p>19 Q. (BY MR. HAMM) Is there anything more</p> <p>20 than the contract, the underlying</p> <p>21 contract, that you say Mr. Saele</p> <p>22 breached to support your conversion</p> <p>23 plan? Let me ask it this way --</p>
<p style="text-align: right;">Page 67</p> <p>1 Q. Okay.</p> <p>2 A. Because Spectrum wanted the equipment</p> <p>3 and everything released from liens,</p> <p>4 also from Region's liens and from the</p> <p>5 IRS. So suddenly, because Vince pulls</p> <p>6 out of that agreement, I can't fulfill</p> <p>7 the portion for Spectrum.</p> <p>8 Q. So you're telling the Court and</p> <p>9 testifying today that by virtue of Mr.</p> <p>10 Saele not following through with his</p> <p>11 obligations under this September 24th,</p> <p>12 2004 contract, he converted your</p> <p>13 business to his use?</p> <p>14 A. Well, he took it to his use, but we</p> <p>15 signed this contract.</p> <p>16 Q. Okay. And then failing to follow</p> <p>17 through with this agreement of</p> <p>18 September the 24th, right?</p> <p>19 A. I signed over the ABC license, signed</p> <p>20 over the power, signed over everything</p> <p>21 immediately once this was done.</p> <p>22 Q. Um-hmm. I'm just trying to understand</p> <p>23 the basis of your claim.</p>	<p style="text-align: right;">Page 69</p> <p>1 unless you wish to answer that</p> <p>2 question.</p> <p>3 A. I'm thoroughly --</p> <p>4 Q. Had Mr. Saele followed through with</p> <p>5 the contract?</p> <p>6 A. Um-hmm.</p> <p>7 Q. Would you have a conversion claim</p> <p>8 against Mr. Saele had he done what</p> <p>9 y'all had agreed on September the</p> <p>10 24th, 2004?</p> <p>11 A. If he had of done -- if he had</p> <p>12 performed -- transferred money and</p> <p>13 signed the lease with Spectrum</p> <p>14 Development, there would be no claim</p> <p>15 against Vince Saele.</p> <p>16 Q. No claim for conversion or no claim at</p> <p>17 all?</p> <p>18 A. I believe there would be no -- that we</p> <p>19 would have no contentions.</p> <p>20 Q. Okay. With respect to unjust</p> <p>21 enrichment, what supports that claim?</p> <p>22 A. That he took over a business without</p> <p>23 the intentions of paying or without</p>

18 (Pages 66 to 69)

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<p style="text-align: right;">Page 70</p> <p>1 paying, and I don't know what his 2 intentions are or not, without paying. 3 Q. Okay. Do you have any evidence or any 4 suggestion today that on September the 5 24th Vince Saele did not intend to 6 purchase this business? 7 A. Except that he had entered into or 8 quickly entered into a deal with Ed 9 Fatzinger to do it. I don't know. 10 Q. So it had -- might be supported by the 11 timing of his agreement with 12 Mr. Fatzinger also? 13 A. I know that they'd had numerous 14 negotiations and discussions, and I 15 don't know what might have been going 16 on. I can't -- I don't know. 17 Q. Well, let's talk about that. What is 18 your understanding of his agreement 19 with Mr. Fatzinger? 20 A. My understanding was -- is that he was 21 going to sign an additional lease, and 22 which is part of what we had 23 discussed, and a \$30,000 note.</p>	<p style="text-align: right;">Page 72</p> <p>1 up title when Vince had failed, 2 decided he was not going to -- to move 3 forward on this. 4 Q. Do you have any indication of when 5 that may have happened? Did you 6 receive notice of that? 7 A. We received notice of the lien 8 intention, which I then spoke to Ed 9 about, and he said it was a formality, 10 to continue to move forward, so that 11 it was only a formality, but he wanted 12 to fulfill this contract that he was 13 aware of because he wanted clean, you 14 know -- this is what he wanted 15 (indicating). 16 Q. Do you recall when you received the 17 notice from Mr. Fatzinger? 18 A. Early -- no. I received -- 19 Q. Let me ask you this: Was it after -- 20 before September the 24th -- 21 A. We had one notice prior to this, and 22 that's when Ed and I were discussing 23 that we're, Vince and I, were working</p>
<p style="text-align: right;">Page 71</p> <p>1 Q. Well, that was part of your agreement? 2 A. Right. That was my understanding that 3 Vince had with Ed. 4 Q. Sitting here today, you know that Mr. 5 Saele is operating a restaurant in the 6 Gator's location on Vaughn Road? 7 A. Right. Right. 8 Q. How did that come to be, or what is 9 your understanding of how that came to 10 be? 11 A. Because I handed him the keys and the 12 reputation and the equipment. 13 Q. Did something occur between -- well, 14 since between September -- 15 A. And I signed over the license and I 16 signed over everything and I gave him 17 the phone. I did all of this. 18 Q. But you know Spectrum Development 19 continues to own that facility out 20 there; is that correct? 21 A. Correct. Ed was forced into 22 exercising a lien, if that's what 23 you're getting to, in order to clear</p>	<p style="text-align: right;">Page 73</p> <p>1 on this to move forward. 2 Q. Okay. Was there a notice subsequent 3 from Mr. Fatzinger, subsequent to the 4 September the 24th, 2004? 5 MR. YARBROUGH: I object to 6 the form and let me tell you the basis 7 of my objection. You're not 8 specifying notice of point, and -- 9 Q. (BY MR. HAMM) Well, did you receive 10 any correspondence from Mr. Fatzinger 11 subsequent -- 12 A. I believe we did. 13 Q. What do you recall that correspondence 14 being subsequent to September the 15 24th, 2004? 16 A. I'm not sure because we deal with each 17 other, Ed and I, separately. I don't 18 know. I mean, I just know that he was 19 telling me we need to get something 20 resolved here. We need to get this 21 thing moving. 22 Q. So following September the 24th, 2004, 23 Mr. Fatzinger was suggesting to you to</p>

19 (Pages 70 to 73)

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<p style="text-align: right;">Page 74</p> <p>1 get this transaction resolved?</p> <p>2 A. Even prior to September 24th. He was</p> <p>3 putting pressure on Region's. He</p> <p>4 wanted to put pressure on Region's and</p> <p>5 the IRS and everybody to let's get</p> <p>6 this thing done and settle up. So he</p> <p>7 was taking action to help me</p> <p>8 facilitate getting everybody on the</p> <p>9 same page. That was Ed's idea of a</p> <p>10 way to make it all happen faster, not</p> <p>11 in turn to steal the restaurant or</p> <p>12 force me out, but to make it happen.</p> <p>13 Q. Are you suggesting that Mr. Fatzinger</p> <p>14 --</p> <p>15 A. Um-hmm.</p> <p>16 Q. -- or Spectrum Development and</p> <p>17 Mr. Saele, acting for V Restaurants,</p> <p>18 they got together in some way to cheat</p> <p>19 you out of your restaurant and this --</p> <p>20 A. No. No. I'm saying that Spectrum</p> <p>21 Development -- Spectrum Development</p> <p>22 initiated a letter prior to this to</p> <p>23 help me make sure that Region's was</p>	<p style="text-align: right;">Page 76</p> <p>1 told me I'm initiating a lien, this</p> <p>2 notice of foreclosure, in order to</p> <p>3 force everybody else to see the</p> <p>4 urgency to get this deal done but with</p> <p>5 no intentions of taking any actions on</p> <p>6 anything.</p> <p>7 Q. When did that occur? When were you</p> <p>8 informed of that?</p> <p>9 A. Well, Ed and I were in discussion. I</p> <p>10 was trying to get this deal done</p> <p>11 mid-September and early September,</p> <p>12 that we were trying to get the deal</p> <p>13 done, and we were waiting for Region's</p> <p>14 to give us the paperwork, and he said,</p> <p>15 well, I can help force that half, and</p> <p>16 that's what was happening.</p> <p>17 Q. So he issued some notice that he was</p> <p>18 going to foreclose his lien?</p> <p>19 A. He issued some -- beginning of</p> <p>20 foreclosure proceedings.</p> <p>21 Q. Did that ever occur that you know of?</p> <p>22 A. That the foreclosure occurred?</p> <p>23 Q. That there was a foreclosure of the</p>
<p style="text-align: right;">Page 75</p> <p>1 going to be in full agreement and the</p> <p>2 IRS of the \$30,000 offer being offered</p> <p>3 by Vince Saele and V Restaurants. So</p> <p>4 he was issuing a lien but not with any</p> <p>5 intentions of actually forcing it, but</p> <p>6 to clean this -- to make things go</p> <p>7 forward, to help perpetuate.</p> <p>8 Q. You're not suggesting that Mr. Saele</p> <p>9 and V Restaurants and Spectrum and</p> <p>10 Mr. Fatzinger got together in some way</p> <p>11 to deprive you of your restaurant, are</p> <p>12 you?</p> <p>13 A. You know, I can't -- in retrospect, I</p> <p>14 can't say that's not the case. All I</p> <p>15 can say is, for a fact, is that Ed at</p> <p>16 that time, Ed Fatzinger, expressed to</p> <p>17 me that he was initiating this letter</p> <p>18 in order to help me facilitate and get</p> <p>19 everybody on the same page to get this</p> <p>20 deal done.</p> <p>21 Q. Okay. You're saying in retrospect you</p> <p>22 cannot say that that was not the case?</p> <p>23 A. Right. All I know is at that time Ed</p>	<p style="text-align: right;">Page 77</p> <p>1 landlord's lien --</p> <p>2 A. Yes.</p> <p>3 Q. -- on the furniture and, I guess,</p> <p>4 everything --</p> <p>5 A. Right.</p> <p>6 Q. -- that Simple Pleasures owned inside</p> <p>7 of the restaurant?</p> <p>8 A. Right. After Vince had said he was no</p> <p>9 intentions of paying.</p> <p>10 Q. Okay. So it occurred following</p> <p>11 Mr. Saele's -- the letter from</p> <p>12 Mr. Russell --</p> <p>13 A. Correct. Correct.</p> <p>14 Q. -- that is Exhibit No. 3 --</p> <p>15 A. Correct.</p> <p>16 Q. -- of Mr. Saele's deposition?</p> <p>17 A. Right.</p> <p>18 Q. Okay. Following that, the landlord</p> <p>19 foreclosed their lien?</p> <p>20 A. Correct.</p> <p>21 Q. Are you aware today of any defects in</p> <p>22 that process, that it should not have</p> <p>23 happened, or they didn't do some</p>

20 (Pages 74 to 77)

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<p style="text-align: right;">Page 78</p> <p>1 noticing procedures, or the legal 2 process was wrong? 3 A. You know, I don't think -- I don't 4 know. I don't know. 5 Q. Are you aware of any facts, anything 6 that might give you reason to 7 challenge that? 8 A. Well -- 9 Q. Other than you not liking the outcome? 10 MR. MEMORY: I object to the 11 form. 12 A. There was no effort to really make an 13 active true sale -- I mean, no real 14 postings, no real -- I mean, if you 15 want to sell something to get a real 16 profit for it, you know, get as much 17 money as you could, I don't think that 18 was actively done, no. 19 Q. (BY MR. HAMM) Okay. Other than the 20 failure to solicit all offers or 21 whatever -- 22 A. Right. 23 Q. -- to properly advertise --</p>	<p style="text-align: right;">Page 80</p> <p>1 not going to do it and says we're not 2 going to execute. I'm not going to 3 pay you for this. 4 Q. Is it fair to say that the facts are 5 his failure to go through with this 6 contract of September the 24th, 2004, 7 that's what -- those are the facts 8 that support your fraud claim? 9 A. Is his failure to execute this deal. 10 Q. Did he tell you anything that was 11 misleading? Can you tell me any -- 12 anything he told you about the 13 September 24, 2004 contract that was 14 untrue, that you know today to be 15 untrue? 16 A. I don't think -- I mean, do I know any 17 facts? Would you restate that 18 question? Do I know of any facts that 19 he said that were untrue? 20 Q. Right. On or about September -- any 21 representations he made to you about 22 this September 24 contract to get you 23 to sign or that you know today to be</p>
<p style="text-align: right;">Page 79</p> <p>1 A. Where it was quietly coming to the 2 conclusion that we're trying to do 3 this amount of money, yes, that's 4 probably what was happening at that 5 particular time because it was 6 operating and Spectrum had wanted 7 Vince to continue, or V Restaurants, 8 to continue operating, wanted an 9 operating entity, not someone to come 10 pull the equipment out. 11 Q. What facts do you know today to 12 support your claim that V Restaurants, 13 or Mr. Saele, defrauded you in some 14 manner? 15 A. The facts are -- is that I delivered 16 the full intentions of what I was 17 delivering, what was being requested. 18 I gave him full access, gave him keys, 19 gave him everything. He had no 20 hindrances to owning and operating 21 that business. 22 Q. Okay. 23 A. And he submits a letter and says I'm</p>	<p style="text-align: right;">Page 81</p> <p>1 untrue, to get you to sign this 2 document? 3 A. Well, I know today that he then chose 4 not to fulfill the contract, even 5 though there was no -- that time was 6 not the issue. He had full access. 7 That was not an issue, and that was, 8 you know -- so there was no reason for 9 him to withdraw the contract. The 10 contract was still in place as far as 11 -- or an agreement between the two of 12 us was still in full agreement, 13 enforcement. 14 Q. Let me ask you this way: Other than 15 Mr. Saele and V Restaurants' failure 16 to follow through with the contract of 17 September the 24th, are there any 18 other facts that support your fraud 19 claim? 20 A. Did he try to then buy the equipment 21 at the low price to get it in and to 22 do it in a subversive manner? Yes, I 23 think that is exactly what he was</p>

21 (Pages 78 to 81)

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<p style="text-align: right;">Page 82</p> <p>1 trying to do.</p> <p>2 Q. Okay. You think on September the</p> <p>3 24th, 2004 he was attempting to do</p> <p>4 that?</p> <p>5 A. No.</p> <p>6 Q. Okay. When did that -- when did you</p> <p>7 --</p> <p>8 A. I don't know.</p> <p>9 Q. When did that occur?</p> <p>10 A. I should say I don't know that that</p> <p>11 wasn't his mindset, attempting --</p> <p>12 Q. Okay.</p> <p>13 A. I did not think it was or I wouldn't</p> <p>14 have signed it.</p> <p>15 Q. You're sitting here today telling us</p> <p>16 that Mr. Saele bought this restaurant</p> <p>17 equipment at a below-market price; is</p> <p>18 that correct?</p> <p>19 A. Correct.</p> <p>20 Q. And that fact supports your contention</p> <p>21 that you were defrauded in some manner</p> <p>22 or helps aid in supporting your</p> <p>23 contention you were defrauded in some</p>	<p style="text-align: right;">Page 84</p> <p>1 MR. MEMORY: What time is it?</p> <p>2 MR. HAMM: 11:15 by my watch,</p> <p>3 but it's unreliable.</p> <p>4 MR. MEMORY: What time have</p> <p>5 you got, Coleman?</p> <p>6 MR. YARBROUGH: I have 11:15.</p> <p>7 MR. MEMORY: I've got 30</p> <p>8 minutes to get to Tuskegee for a</p> <p>9 twelve noon meeting.</p> <p>10 Q. (BY MR. HAMM) With respect to the</p> <p>11 conspiracy count, do you understand</p> <p>12 generally what conspiracy is?</p> <p>13 A. Um-hmm, yes.</p> <p>14 Q. Tell me what you understand a</p> <p>15 conspiracy to be.</p> <p>16 A. Collusion.</p> <p>17 Q. An agreement --</p> <p>18 A. An agreement --</p> <p>19 Q. -- between people to do something</p> <p>20 wrong?</p> <p>21 A. To do something to -- that harms</p> <p>22 another party.</p> <p>23 Q. Okay. Between who in your case?</p>
<p style="text-align: right;">Page 83</p> <p>1 manner; is that correct?</p> <p>2 A. Correct.</p> <p>3 Q. Okay. But other than that fact, is</p> <p>4 there anything that you know other</p> <p>5 than the fact that Mr. Saele purchased</p> <p>6 this restaurant at, you say, a</p> <p>7 below-market price, there's no other</p> <p>8 facts that you know that support the</p> <p>9 fact -- support the notion that you</p> <p>10 were defrauded in some manner?</p> <p>11 A. I just keep getting to the fact that</p> <p>12 he withdrew the contract that was</p> <p>13 going to be paid --</p> <p>14 Q. Right.</p> <p>15 A. -- and then everything would have been</p> <p>16 fine.</p> <p>17 Q. Withdrew the contract and purchased it</p> <p>18 below market, correct?</p> <p>19 A. Right. Because I had no use for it at</p> <p>20 that point.</p> <p>21 Q. Okay. You've also alleged that --</p> <p>22 MR. HAMM: Mr. Memory, I know</p> <p>23 you've got to get out of here.</p>	<p style="text-align: right;">Page 85</p> <p>1 A. In my case it would have been between</p> <p>2 Spectrum Development and --</p> <p>3 MR. HAMM: I'm going to stand</p> <p>4 up for a second.</p> <p>5 A. -- and Vince Saele or Ed Fatzinger and</p> <p>6 Vince Saele.</p> <p>7 Q. (BY MR. HAMM) Spectrum Development</p> <p>8 and --</p> <p>9 A. -- or Ed Fatzinger and Vince Saele.</p> <p>10 Q. The four parties to this litigation:</p> <p>11 Fatzinger -- well, he's not a party to</p> <p>12 this litigation. Spectrum</p> <p>13 Development, Vince Saele, and V</p> <p>14 Restaurants?</p> <p>15 A. Correct.</p> <p>16 Q. They got together in some manner to do</p> <p>17 you some harm?</p> <p>18 A. It is possible.</p> <p>19 Q. Oh, okay. Do you know it to be a fact</p> <p>20 or agreed in some manner to do you</p> <p>21 some harm?</p> <p>22 A. I do know that they came to an</p> <p>23 agreement on how to execute and how to</p>

22 (Pages 82 to 85)

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<p style="text-align: right;">Page 86</p> <p>1 end up with the restaurant and its --</p> <p>2 and everything.</p> <p>3 Q. Do you know when they came to this</p> <p>4 agreement?</p> <p>5 A. No.</p> <p>6 Q. How did you learn of the agreement?</p> <p>7 A. Well, I guess technically I don't know</p> <p>8 of a specific agreement, I guess, in</p> <p>9 retrospect of --</p> <p>10 Q. Okay. How do you know there was an</p> <p>11 agreement then? Maybe I should ask it</p> <p>12 that way.</p> <p>13 A. I would assume that they had come to</p> <p>14 some level and it was being an</p> <p>15 assumption I would have made.</p> <p>16 Q. Okay. And how do you draw that</p> <p>17 conclusion that there was an</p> <p>18 agreement?</p> <p>19 A. The fact of him pulling, refusing to</p> <p>20 pay and figuring out a way to -- he</p> <p>21 had to have gotten clear title from</p> <p>22 Spectrum because Spectrum was the one</p> <p>23 that was going to end up owning</p>	<p style="text-align: right;">Page 88</p> <p>1 would have been before or after that</p> <p>2 date?</p> <p>3 A. I would assume that he would be</p> <p>4 looking at it in November 30 -- prior</p> <p>5 to the November 30th date.</p> <p>6 Q. You think they made some agreement</p> <p>7 prior to November 30th, 2004 to --</p> <p>8 A. I can't say that they -- honestly</p> <p>9 can't say that they, in my mind, made</p> <p>10 it or rather Vince had figured out a</p> <p>11 way to try to -- to come -- whether</p> <p>12 Vince had figured out a way, by having</p> <p>13 discussions with Ed Fatzinger, on</p> <p>14 ascertaining the business in a</p> <p>15 different form.</p> <p>16 Q. So you think that Mr. Saele may have</p> <p>17 just kind of conjured up a plan?</p> <p>18 A. Right. From discussions with Ed</p> <p>19 Fatzinger.</p> <p>20 Q. And would that conjuring up of plans</p> <p>21 be to not go through with the contract</p> <p>22 with you, which --</p> <p>23 A. Right.</p>
<p style="text-align: right;">Page 87</p> <p>1 everything.</p> <p>2 Q. Do you think that agreement occurred</p> <p>3 before September the 24th, 2004?</p> <p>4 A. I would not have been aware. I don't</p> <p>5 know.</p> <p>6 Q. Okay. Do you think it may have</p> <p>7 occurred -- have you got anything to</p> <p>8 indicate that if occurred after</p> <p>9 September the 24th, 2004?</p> <p>10 A. It would have been more -- or likely</p> <p>11 after.</p> <p>12 Q. Do you think it would have been before</p> <p>13 or after the Saele Exhibit Number 3,</p> <p>14 the Exhibit Number 3 to his</p> <p>15 deposition, which is dated November</p> <p>16 the 30th, 2004?</p> <p>17 MR. HAMM: Then that's the</p> <p>18 letter filed Exhibit Number 3, the</p> <p>19 letter from Mr. Russell. I'll make a</p> <p>20 copy of this and hand it to Mr.</p> <p>21 Goodwyn's deposition.</p> <p>22 Q. (BY MR. HAMM) But do you think it</p> <p>23 would have been -- that agreement</p>	<p style="text-align: right;">Page 89</p> <p>1 Q. -- was on September the 24th --</p> <p>2 A. Correct.</p> <p>3 Q. -- and then wait for Spectrum</p> <p>4 Development to foreclose their lien?</p> <p>5 A. Correct.</p> <p>6 Q. Okay. Other than that happening, the</p> <p>7 events happening in that manner; that</p> <p>8 is, the contract did not go through,</p> <p>9 and, yes, in fact, Spectrum</p> <p>10 Development did foreclose their lien</p> <p>11 on the furniture and fixtures in this</p> <p>12 restaurant, and thereby have rights to</p> <p>13 that property, other than those two</p> <p>14 things occurring, what other facts do</p> <p>15 you know today that support a</p> <p>16 conspiracy count?</p> <p>17 A. None.</p> <p>18 MR. HAMM: Von, you want to --</p> <p>19 let's just adjourn this deposition.</p> <p>20 MR. MEMORY: That's fine.</p> <p>21 MR. HAMM: I think that might</p> <p>22 be best because I've got some more,</p> <p>23 and you've got to get to Tuskegee.</p>

23 (Pages 86 to 89)

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<p style="text-align: right;">Page 90</p> <p>1 (Whereupon, the deposition of PHILLIP 2 GOODWYN was adjourned at approximately 3 11:29 a.m., on February 17, 2006.) 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23</p>	<p style="text-align: right;">Page 92</p> <p>1 the foregoing 90 typewritten pages 2 contain a true and accurate 3 transcription of the examination of 4 said witness by counsel for the 5 parties set out herein; that the 6 reading and signing of said deposition 7 was waived by witness and counsel for 8 the parties. 9 I further certify that I am 10 neither of kin nor of counsel to the 11 parties to said cause, nor in any 12 manner interested in the results 13 thereof. 14 This 27th day of February, 2006. 15 16 17 Aimee French, 18 Reporter and Notary Public 19 State of Alabama at Large 20 21 22 23</p>
<p style="text-align: right;">Page 91</p> <p>1 * * * * * 2 REPORTER'S CERTIFICATE 3 * * * * * 4 5 STATE OF ALABAMA 6 COUNTY OF MONTGOMERY 7 8 I, Aimee French, Certified 9 Shorthand Reporter and Notary Public 10 in and for the State of Alabama at 11 Large, do hereby certify that on 12 February 17, 2006, pursuant to notice 13 and stipulation on behalf of the 14 Defendant, I reported the deposition 15 of PHILLIP GOODWYN, who was first duly 16 sworn by me to speak the truth, the 17 whole truth, and nothing but the 18 truth, in the matter of SIMPLE 19 PLEASURES, INC., Plaintiff, versus V 20 RESTAURANTS, INC., ET AL, Defendants, 21 Case Number 05-32325-WRS, now pending 22 in the United States Bankruptcy Court 23 for Montgomery County, Alabama; that</p>	

24 (Pages 90 to 92)

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September 24, 2004

VIA FACSIMILE - 834-8001


Von G. Memory
Attorney at Law
469 S. McDonough Street
Montgomery, Alabama 36104

Dear Von:

I am in receipt of your sales agreement and have briefly reviewed same, deciding that it is not possible to make the corrections and amendments this afternoon prior to 5:00. Thus, I write this letter as a memorandum of agreement, which I believe contains the pertinent provisions, until we can get the final draft documentation agreed upon. They are as follows:

1. That the purchase price shall be \$90,000.00;
2. That the purchase price is for all of the assets, including, but not limited to, licenses and leases, equipment, office supplies, inventory, automobiles/delivery van, etc., and any other of the same located off-premises in storage buildings, etc.;
3. That Seller will lease the business to Buyer, along with all licenses and property until the date of closing for the sum of \$250.00;
4. That the ownership of the properties mentioned herein above will be transferred to my client at a closing date no later than October 22, 2004, or as otherwise agreed upon by the parties, and that the property transferred shall be transferred without any liens or encumbrances whatsoever;
5. That the closing is contingent upon Regions accepting the sum of \$30,000.00 for Phillips' lien.
6. That Spectrum Development will accept a note from Vince in the amount of \$30,000.00 and that the \$30,000.00 note shall be counted as consideration towards the purchase of the business;

Von G. Memory
September 24, 2004
Page Two

7. That Buyer is entitled to all revenues derived from the business from the date of the consummation of this agreement forward;
8. That the remaining \$30,000.00 be paid to the Internal Revenue Service for and in consideration of the release of any and all liens which they may have against Phillip, individually, or the business (if any additional monies are owed, Phillip pays);
9. In the event that any of the contingencies stated herein are not complied with or fulfilled by the Obligor, consideration shall be immediately withdrawn from the Trust Account and returned to the Purchaser;
10. That upon the consummation of this document, the Purchaser shall be entitled to utilize the premises and operate the business in its normal manner and without interference from Mr. Goodwyn;
11. That the catering business operating out of Gator's shall continue, but only be operated by its new owner;
12.  That if any of the contingencies fail wherein the Seller is the Obligor, Seller shall reimburse Purchaser for any and all net financial losses or expenses related thereto.

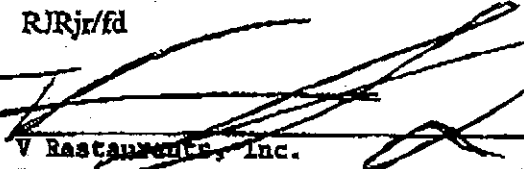

Von, my client is at wits end and feels he may be wasting his time. These terms are non-negotiable and this must be signed by tomorrow at noon (Saturday, September 25, 2004).

Sincerely,

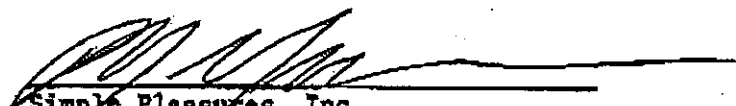


Robert J. Russell, Jr.

RJRjr/fd



V Restaurants, Inc.
By: Vince Saele
Its: President



Simple Pleasures, Inc.
By: Phillip Goodwyn
Its: President

**IN THE UNITED STATES
BANKRUPTCY COURT FOR THE
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION**

**IN RE:
PHILLIP GOODWYN,
DEBTOR,

SIMPLE PLEASURES, INC.,
PLAINTIFF,

V.

V. RESTAURANTS, INC.,
DEFENDANT.**

**CHAPTER 7
CASE NO. 05-32325-WRS

ADVERSARY PROCEEDING
NO. 05-03062**

**AFFIDAVIT OF
ROBERT J. RUSSELL, JR.**

My name is Robert J. Russell, Jr. and I am over 19 years of age and competent to testify to the following:

1. I am a licensed practicing attorney in Montgomery, Alabama and have been so since 1986. I currently practice in the law firm of Parnell & Crum, P.A. in Montgomery, Alabama. I am a member of the Alabama State Bar and in good standing.
2. During the year 2004, Vince Saele, acting on behalf of V Restaurants, Inc. (hereinafter V Restaurants) retained me to represent V Restaurants with its upcoming acquisition of a restaurant known as Gators Restaurant located in the Vaughn Plaza Shopping Center in Montgomery Alabama. Mr. Saele was the owner of V Restaurants. At the time I was employed, Gators Restaurant was owned by Simple Pleasures, Inc. Simple Pleasures was owned by its President, Mr. Phillip Goodwyn.

3. During the summer of 2004, again acting on behalf of V Restaurants, I began negotiations with Mr. Von Memory, Esq. who at the time represented Mr. Goodwyn and Simple Pleasures, Inc. The purpose of this negotiation was to reach an agreement between Simple Pleasures, Inc. and V Restaurants, Inc. for the acquisition of the Gators Restaurant location.

4. Over the course of that summer there were several proposals tendered by Mr. Memory acting on behalf of Simple Pleasures, Inc. I responded to these proposals after consultation with Mr. Saele.

5. The negotiations for the acquisition of the Gators Restaurant location was made more difficult because of outstanding Federal tax liens and a secured interest owned by Regions Bank. These liens attached to the furniture and fixtures housed within the restaurant location. In addition to these encumbrances upon the property, Mr. Goodwyn had allowed the monthly rental payments to go unpaid for a number of months, creating a rental obligation to the owner of the restaurant location, Spectrum Development, Inc.

6. Negotiations continued for several weeks and Mr. Saele instructed me to respond to one of Mr. Memory's latter proposals with a letter dated September 24, 2004. This letter detailed the terms and conditions upon which Mr. Saele and V Restaurants, Inc. would take title to the restaurant location. A copy of this letter is made a part of this affidavit. The letter was signed by Mr. Saele and Mr. Goodwyn, both acting on behalf of corporations involved in the transaction.

7. Mr. Saele was at that time operating the restaurant and wanted the sale/purchase to take place or he would then be forced to take alternative routes. This

letter/agreement set out the terms and conditions upon which Mr. Saele was willing to proceed with the acquisition of the Gator's restaurant location. This letter/agreement contained the terms important to Mr. Saele regarding the restaurant acquisition.

8. Paragraph #4 of the September 24, 2004 letter required Mr. Goodwyn to transfer the Gators Restaurant to V Restaurants, Inc. free of the Federal tax liens and the Region Bank interest. This transfer was to occur on or before October 22, 2004, and should the liens not be cleared and the transfer occur, then the agreement would become void and Mr. Saele and V Restaurants would be released from the agreement.

9. Between the writing of the letter on September 24, 2004 and the agreed date upon which the transfer was to take place, October 22, 2004, I made a number of phone calls to Mr. Memory's office to determine the progress of efforts on behalf of Mr. Goodwyn to clear the liens and encumbrances in question. Through-out all of theses calls, when I did receive a return phone call, I was never provided any assurance that the subject liens and encumbrances (Federal Tax lien and Regions lien) were being addressed by Mr. Goodwyn.

10. In spite of my additional efforts, I received no confirmation of sale from either Mr. Goodwyn or Mr. Memory.

RESPECTFULLY SUBMITTED this the 14th day of March, 2006.



ROBERT J. RUSSELL, JR.

STATE OF ALABAMA

MONTGOMERY COUNTY

I, the undersigned authority, a Notary Public for the State at Large, hereby certify that Robert J. Russell, Jr., whose name is signed to the foregoing conveyance, and who is known to me, acknowledge before me on this day, that being informed of the contents of the conveyance, he executed the same voluntarily on the day the same bears date.

GIVEN under my hand and official seal the 14th day of March, 2006.


NOTARY PUBLIC
MY COMMISSION EXPIRES: 10-21-07

**IN THE UNITED STATES
BANKRUPTCY COURT FOR THE
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION**

**IN RE:
PHILLIP GOODWYN,
DEBTOR,

SIMPLE PLEASURES, INC.,
PLAINTIFF,

V.

V. RESTAURANTS, INC., AND
VINCE SAELE,
DEFENDANTS.**

**CHAPTER 7
CASE NO. 05-32325-WRS

ADVERSARY PROCEEDING
NO. 05-03062**

**DEFENDANT'S REPLY TO
PLAINTIFF'S BRIEF IN RESPONSE
TO SUMMARY JUDGMENT**

COMES NOW V Restaurants, Inc. and Vince Saele, Defendants in the above styled action, by and through their attorney of record, and replies to the Plaintiff's *Brief in Response to Motion for Summary Judgment of Defendant's*.

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FACTUAL BASIS

Simple Pleasures, Inc. has for several years operated the restaurant known as Gator. The restaurant operates from the Vaughan Plaza Shopping Center in Montgomery, Alabama. Phillip Goodwyn is the sole shareholder of Simple Pleasures and was, up until September 2004, the operator of the Gators.

For several months prior to Mr. Goodwyn leaving the restaurant location, Gator had suffered financial problems. These financial problems resulted in substantial unpaid rent owed to Defendant Spectrum/Vaughn Plaza L.L.C. In addition to the rental obligation, unpaid Federal employee withholding taxes resulted in substantial Federal tax liens filed by the Internal Revenue Service. The restaurant was also in default on an obligation to Regions Bank who held a secured interest in the restaurant equipment.

During the Summer of 2004, Mr. Vince Saele acting as a consultant employed by Simple Pleasures began working at the Gators restaurant. Mr. Saele's efforts were to evaluate the restaurant and determine if it could become profitable. Mr. Goodwyn and Mr. Saele always anticipated that Mr. Saele may wish to enter an agreement with Mr. Goodwyn and Simple Pleasures and Spectrum/Vaughn Plaza L.L.C. to purchase the restaurant. Should the restaurant purchase come to pass, Mr. Saele would make the purchase through his corporation know as V Restaurants, Inc. Any agreement would address the unpaid rental obligation, the Federal tax liens and a secured interest that Regions Bank held in the restaurant equipment.

On September 24, 2004, after several weeks of negotiations between Mr. Goodwyn counsel and Mr. Saele counsel, Mr. Goodwyn and Mr. Saele, acting on behalf or their respective corporations, entered a letter of understanding at to the essential terms

of the restaurant sale/purchase. This letter is now a part of the file in this case and is attached as an exhibit to the Complaint.

A necessary condition of the letter of understanding dated September 24, 2004, between the seller and purchaser was that the transfer would occur "without any lien or encumbrances whatsoever." In addition, the transfer was to occur "at a closing date no later than October 22, 2004" and should any of the contingencies not occur "consideration shall be withdrawn from the Trust Account and returned to the Purchaser."

The Federal tax liens and the Regions secured interest were not cleared by October 22, 2004 and the property could not transfer without the attached liens as required in the letter of understanding. Mr. Saele and V Restaurants, Inc. elected to forgo the purchase of the restaurant from the Simple Pleasures, Inc.

Now Simple Pleasures, Inc. and Phillip Goodwyn sue V Restaurants, Inc, Spectrum/Vaughan Plaza, L.L.C. and Vince Saele for breach of contract, conversion, unjust enrichment, damages for use, fraud, negligence, wantonness, willfulness and conspiracy. The Defendant V Restaurants, Inc, and Vince Saele now move for summary judgment alleging that there is no genuine issue as to any material fact.

ARGUMENT

Bankruptcy Rules of Procedure 7056 and Federal Rule of Civil Procedure 56(c) provides that summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." An issue of fact is "material" if, under the applicable

substantive law, it might affect the outcome of the case. *Allen v. Tyson Foods*, 121 F.3d 642, 646 (11th Cir.1997) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Tipton v. Bergrohr GMBH-Siegen*, 965 F.2d 994, 998 (11th Cir.1992)). An issue of fact is "genuine" if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party. A court must decide "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251, 252, 106 S.Ct. 2505.

The moving party bears "the initial responsibility of informing the ... court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Where the nonmoving party bears the burden of proof at trial, the moving party may discharge this "initial responsibility" by showing that there is an absence of evidence to support the nonmoving party's case or by showing that the nonmoving party will be unable to prove its case at trial. *United States v. Four Parcels of Real Property*, 941 F.2d 1428, 1437-38 (11th Cir.1991). To survive summary judgment, the nonmoving party bearing the ultimate burden of proof at trial must come forward with evidence sufficient to withstand a directed verdict motion. *Fitzpatrick v. Atlanta*, 2 F.3d 1112, 1116 (11th Cir.1993).

On summary judgment, "the evidence of the non-movant is to be believed." *Anderson*, 477 U.S. at 255, 106 S.Ct. 2505. "The district court should resolve all

reasonable doubts about the facts in favor of the non-movant, and draw all justifiable inferences ... in his favor." *Four Parcels*, 941 F.2d at 1428.

Breach of Contract

This contract was breached; however, the breach was by Simple Pleasures, Inc and not by the Defendants. When a contracting party breaches its contract in a material manner the opposing party's right of action is complete upon the breach. *Seybold v. Magnolia Land Co.*, 376 So.2d 1083 (Ala.1979). A material breach is one that touches the fundamental purposes of the contract and defeats the object of the parties in making the contract. *Rogers v. Relyea*, 184 Mont. 1, 601 P.2d 37 (1979).

Simple Pleasures agreed to transfer the restaurant equipment without the Federal tax liens and the Regions secured interest and agreed to accomplish this by October 22, 2004. (See Complaint and letter of understanding attached) Mr. Goodwyn testified that the liens were not resolved on the required date. (Goodwyn Deposition page 50) The Regions liens were not released to allow a transfer of good title.

Date Certain – Time of the Essence

The Plaintiff now contends that the date stated in the contract, October 22, 2004, itself did not make time of the essence in this contract. This argument is without merit. It is a general rule in equity that time is not of the essence of a contract. However, the parties to a contract may make time of its essence by a clear manifestation of their intent to do so in the terms of their agreement. *Moore v. Lovelace*, 413 So.2d 1100 (Ala.1982); *Isom v. Johnson*, 205 Ala. 157, 158, 87 So. 543 (1921).

In this case, the agreement between the parties required the restaurant to "... be transferred no latter than October 22, 2004, or as otherwise agreed upon by the

parties...”. The Plaintiff has produced no evidence of any subsequent agreement to transfer the restaurant after the October 22, 2004, date. In addition the agreement stated further “That in the event any of the contingencies stated herein are not fulfilled by the Obligor, consideration shall be immediately withdrawn from the Trust Account and returned to the Purchaser.” More importantly the agreement states “Von, my client is at his wits end and feels he may be wasting his time. These terms are non-negotiable and this must be signed by tomorrow at noon (Saturday, September 25, 2004).”

The agreement clearly indicated the intent that time was of the essence in the agreement. The evidence of the parties’ intent is strong enough to warrant this Court finding this issue as a matter of law. A date certain was placed in the contract, the agreement provided provisions as to events that would occur if that date certain were not met, and the agreement stated that the Purchaser (the V Restaurants and Saele) were not open to any further delays.

Substantial Performance

Where a contract is substantially performed by one party and the benefits thereof retained by the other, recovery may be had in an action of this kind on an averment of full or complete performance, although the proof shows only a substantial performance. Substantial performance does not contemplate a full or exact performance of every slight or unimportant detail, but performance of all important parts. *Wilson v. Williams*, 257 Ala. 445, 59 So.2d 616, (Ala. 1963).

In this case, Goodwyn did not substantially perform his duties under the agreement. Although V Restaurants was placed in possession of the restaurant, Goodwyn was never, and still cannot today, deliver good title to the restaurant. The inability to

deliver good and marketable title to the subject of the contract will operate to deny recovery for substantial performance. *Gadsden Brick Co. v. Cranford*, 273 Ala. 37, 134 So.2d 421, (Ala. 1961).

Waiver

The Plaintiff argues that V Restaurants and Saele waived the right to have Goodwyn perform the terms of this agreement in a timely manner by failing to include a provision for strict compliance in the letter agreement. The Defendant reiterates the arguments contained under the heading *Date Certain – Time of the Essence*. In addition the Plaintiff advances no evidence to support this waiver.

Conversion

The Defendants are entitle to a judgment in their favor for the Plaintiff's claim of conversion. To establish conversion, a plaintiff must show a wrongful taking, an illegal assumption of ownership, an illegal use or misuse of another's property, or a wrongful detention or interference with another's property. The plaintiff must establish that the defendant converted specific personal property to the defendant's own use and beneficial enjoyment. *Ellis v. Alcuri*, 710 So.2d 1266, 1267 (Ala.Civ.App.1997), citing *Huntsville Golf Dev., Inc. v. Ratcliff, Inc.*, 646 So.2d 1334, 1336 (Ala.1994), *Anderson v. Smith's Towing Co., Inc.*, 867 So.2d 1121, (Ala.Civ.App.,2002).

The Plaintiffs have failed to produce any evidence of a wrongful taking or an illegal assumption of ownership. The Plaintiffs have failed to advance any evidence of illegal use or misuse of the restaurant or detention of the property over the Defendant's objection.

Unjust Enrichment

Summary judgment in favor of the Defendant is due to be granted for the Plaintiff's claim for unjust enrichment. A party cannot recover on a claim of unjust enrichment where there is an enforceable express contract between the parties concerning the same subject matter on which the unjust-enrichment claim rests. See *Kennedy v. Polar-BEK & Baker Wildwood Partnership*, 682 So.2d 443, (Ala.1996). See also *Barry Mogul & Assocs., Inc. v. Terrestris Dev. Co.*, 267 Ill.App.3d 742, 643 N.E.2d 245, 205 Ill. Dec. 294, (1994), stating:

"It is well established, as a general rule, that a plaintiff cannot pursue a quasi-contractual claim where there is an enforceable express contract between the parties.... 'Difficulties arise with quasi-contractual claims when there is an express contract between the parties. The general rule is that no quasi-contractual claim can arise when a contract exists between the parties concerning the same subject matter on which the quasi-contractual claim rests. The reason for this rule is not difficult to discern. When parties enter into a contract they assume certain risks with an expectation of a return. Sometimes, their expectations are not realized, but they discover that under the contract they have assumed the risk of having those expectations defeated. As a result, they have no remedy under the contract for restoring their expectations. In desperation, they turn to quasi-contract for recovery. This the law will not allow. Quasi-contract is not a means for shifting a risk one has assumed under contract.' *Sullivan v. Mazak Corp.*, 805 So.2d 674, (Ala.,2000).

Fraud

Summary judgment is due to be granted as to the Plaintiff's fraud count. The Plaintiff argues in its response to the Defendant's summary judgment brief that state of mind is not capable of discerning from pleading filed with the Court. As to this matter, the Plaintiff is correct, however, the point of the Defendant's motion is the Plaintiff's failure to designate a time and place where any materially misleading statements or even if there were any materially misleading statements. During Mr. Goodwyn's deposition he

stated that there were no false or misleading statements made to him by either of the Defendants. (Goodwyn deposition page 80 - 82).

CONCLUSION

For the foregoing reasons the Defendants are entitled to a grant of summary judgment in their favor. The Defendants would show unto the Court that there is no genuine issue of material fact and that they are entitled to judgment as a matter of law. In support of this Motion, the Defendant submits this reply brief, it's previous Motion for Summary Judgment and supporting exhibits, all being adopted and incorporated herein by reference. The Defendant respectfully requests that this Honorable Court enter a judgment against the Plaintiff as to all counts in the Plaintiff's complaint.

RESPECTFULLY SUBMITTED this the 24th day of April, 2006.

/s/ Daniel G. Hamm

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CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of this Defendant's Reply to Plaintiff's Brief in Response to Summary Judgment by electronic transmission or by placing a copy in the United States Mail with sufficient postage for first class delivery to the attorneys named below or parties if not represented by counsel.

DONE this the 24th day of April, 2006.

/s/ Daniel G. Hamm

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